87-1644

Supreme Court, U.S.
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No:

IN THE

Supreme Court Of The United States

October Term, 1987

Continental Electric Company, an Alabama corporation; and Randolph Hall, Gaddis Hall and Robert Allen, individually and as co-partners in the partnership doing business as R G & B Leasing,

Petitioners,

v.

American Employers' Insurance Company.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

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QUESTIONS PRESENTED

1. Whether Petitioners were unconstitutionally denied due process of law under the Fourteenth Amendment to the United States Constitution when the Alabama Supreme Court failed to follow established standards of appellate review of the trial court's entry of summary judgment against Petitioners.

2. Whether Petitioners were unconstitutionally denied a trial or hearing, as required by the Due Process Clause of the Fourteenth Amendment of the United States Constitution, when the Alabama Supreme Court affirmed, in part, the summary judgment entered against Petitioners.

3. When the Alabama Supreme Court affirmed, in part, the summary judgment entered against Petitioners, were Petitioners unconstitutionally denied due process of law under the Fourteenth Amendment to the United States Constitution by denial of a trial by jury as quaranteed under Article 1, Section 11 of the Constitution of Alabama of 1901.

4. When the Alabama Supreme Court affirmed, in part, the summary judgment entered against Petitioners, were Petitioners thereby unconstitutionally denied due process of law under the Fourteenth Amendment to the U.S. Constitution by denial of a trial by jury as provided in the Seventh Amendment of the U.S. Constitution and as the provisions of the Seventh Amendment are made applicable to the States through the Due Process Clause of the Fourteenth Amendment.

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IN THE

Supreme Court Of The United States

October Term, 1987

Case No:

Continental Electric Company, an Alabama corporation; and Randolph Hall, Gaddis Hall, and Robert Allen, individually and as co-partners in the partnership doing business as R G & B Leasing,

Petitioners,

v.

American Employers' Insurance Company.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

Continental Electric Company, an Alabama corporation and Randolph Hall, Gaddis Hall and Robert Allen, individually and as co-partners in the partnership doing business as R G & B Leasing (hereinafter collectively referred to as "Continental") petition this Court for a Writ of Certiorari to review the final judgment of the Alabama Supreme Court which affirmed, in part, the summary judgment entered by the trial court in favor of American Employers' Insurance Company (hereinafter referred to as "American") and against Continental.

The caption of this case contains the names of all parties to this proceeding. Continental Electric Company has no parent companies, subsidiaries or affiliates.

OPINION BELOW

The opinion of the Alabama Supreme Court has not been officially reported. A copy of that opinion is included herein in Appendix A, infra. The Alabama Supreme Court's order overruling Continental's application for a rehearing is included in Appendix B, infra. A certification by the Clerk of the Alabama Supreme Court of all orders rendered by the Alabama Supreme Court is included herein in Appendix C, infra.

JURISDICTION

The final judgment of the Alabama Supreme Court was rendered on October 2, 1987. (Appendix C) Continental filed a timely application for a rehearing by the Alabama Supreme Court, which was overruled by that Court on December 4, 1987. (Appendix C)

By Order dated February 18, 1988, the Honorable John Paul Stevens, Associate Justice, granted Petitioners an extension of time to file this Petition, to and including the date of April 2, 1988. (Appendix D)

The Jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

CONSTITUTIONAL, STATUTORY AND OTHER PROVISIONS INVOLVED

Amendment VII, United States Constitution provides in pertinent part:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, ..."

Amendment XIV, Section 1, United States Constitution provides in pertinent part:

> " . . . nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article I, Section 11, Constitution of Alabama of 1901 provides in pertinent part:

> "That the right to trial by jury shall remain inviolate."

Article I, Section 13, Constitution of Alabama of 1901 provides in pertinent part:

> "That all courts shall be open; and that every person, for any injury done him, in his lands, goods, person, or reputation, shall have a remedy by due process of law; and right and justice shall be administered without sale, denial, or delay."

Rule 56, Alabama Rules of Civil Procedure provides in pertinent part:

> (a) *For Claimant.* A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 30 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.
>
> (b) *For Defending Party.* A party against whom a claim, counter-claim or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.
>
> (c) *Motion and Proceedings Thereon* . . . The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law . . . .

STATEMENT OF THE CASE

This Statement of the Case sets out the course of the proceedings and facts pertaining to the two causes of action upon which the Alabama Supreme Court affirmed the summary judgment entered by the trial court against Continental. The other causes of action asserted by Continental against American and for which a summary judgment was

granted by the trial court were reversed by the Alabama Supreme Court and are not involved herein. References to the location in the Appeal Record of each of the following statements are excluded, but will be furnished to this Court in accordance with its instructions.

Continental filed a civil action against American and other defendants in the Tenth Judicial Circuit Court of Alabama. The claims asserted therein against the other defendants were not affected by the trial court's entry of summary judgment, nor were the other defendants parties to the appeal of this action before the Alabama Supreme Court.

Continental's complaint, as amended, consisted of six causes of action asserted against American, namely: breach of contract, fraud, declaratory judgment, bad faith, negligent failure to insure, and breach of an agreement to insure. All of said causes of action arose out of a contract of insurance issued by American to Continental. Continental's breach of contract causes of action consisted of claims that American breached the written terms of the insurance contract and also breached the oral terms of that insurance contract. Continental, in its original and in its amended complaint, demanded a trial by jury on all issues in the civil action.

Continental, on June 30, 1986, filed a motion for a partial summary judgment, pursuant to Rule 56 of the Alabama Rules of Civil Procedure (ARCP), against American on Continental's claims for breach of contract and for declaratory judgment. American, on August 6, 1986, filed a motion for summary judgment against Continental. Thereafter, Continental amended its motion for summary judgment on October 28, 1986.

Upon submission to the trial court of the summary judgment motions of Continental and American, the trial court, on November 17, 1986, granted American's motion for summary judgment on all of said causes of action asserted by Continental against American and denied Continental's motion for a partial summary judgment. On December 1, 1986, the trial court certified, as final, its judgment on the motions for summary judgment.

On December 15, 1986, Continental filed a notice of

appeal to the Alabama Supreme Court from the entry of said final judgment. On October 2, 1987, the Alabama Supreme Court rendered its decision (Appendix A) holding that the summary judgment entered on four of Continental's causes of action was in error, and reversed and remanded same to the trial court. The Alabama Supreme Court also affirmed the summary judgment entered against Continental on two of Continental's causes of action against American; those causes of action being, breached of the written terms of insurance contract issued by American and bad faith refusal by American to pay a claim under that contract.

On October 16, 1987, Continental filed a timely application for a rehearing with the Alabama Supreme Court seeking a rehearing by that Court on its judgment affirming the summary judgment entered by the trial court on said two causes of action. Continental's application for rehearing was overruled on December 4, 1987. (Appendix B)

The issues presented by this Petition were not expressly raised in the lower court prior to that court's entry of the summary judgment against Continental. Such issues relating to a trial by jury were referred to in Continental's original and reply brief in the Alabama Supreme Court by expressed references therein to Continental's rights to a trial by jury and by Continental's references to case decisions involving such right. The Alabama Supreme Court acknowledged that the right to a trial by jury was in issue as evidenced by the several references in that Court's opinion, wherein that Court acknowledged that those causes of action that it reversed were reversed for a determination of the factual issues by the "trier of the fact" and by the Alabama Supreme Court's references to decisions involving such right. In this case the trier of facts is a jury by reason of Continental's demand for same.

The issues raised herein of the denial of a trial by jury on the two specific causes of action upon which the summary judgment was affirmed were expressly raised in the Alabama Supreme Court in Continental's "Statement of Issues Presented" section of its Application for Rehearing, wherein the following issues were asserted:

3. Was the term "equipment" in the insurance contract ambiguous such that Continental is entitled to a jury trial on the issue of the meaning of that term?

4. Was Continental entitled to a jury trial on its cause of action for bad faith against American, if the term "equipment" is found to be ambiguous?

Such foregoing issues would also embrace and included therein each of the issues set forth heretofore in Continental's "Issues Presented" section of this petition, except for Continental's first issue which pertains to the Alabama Supreme Court's failure to follow established standards of appellate review. The Alabama Supreme Court's ruling on the issues pertaining to Continental's right to a trial by jury was made by that Courts' entry of its general order overruling Continental's Application for Rehearing. (Appendix B)

With respect to the issue raised herein pertaining to whether Continental was denied due process of law by the Alabama Supreme Court's failure to follow established standards of appellate review, Continental expressly presented that issue to the Alabama Supreme Court in its Application for Rehearing with supporting brief. (See pages in Appendix F, infra) That issue was ruled on by the Alabama Supreme Court's general order overruling Continental's application for rehearing.

The following pertinent facts pertaining to the issues presented in this petition were abstracted from the opinion of the Alabama Supreme Court and from the documents in the Appeal Record in the Alabama Supreme Court. References to the location in the Appeal Record of each of the following statements will be furnished to this Court in accordance with its instructions.

Continental filed a civil action against American; John Creel (hereinafter referred to as "Creel"), an insurance agent; and Fowlkes and Smith, an insurance agency by whom Creel was employed as an agent.

The causes of action against American arose out of American's failure to pay an insurance claim made by Continental under an insurance policy issued to Continental providing insurance coverage for damages to a display trailer of Continental's. When the display trailer and its samples were

damaged by the trailer's overturn, Continental filed a claim against American for all of the damages it sustained. American paid part of Continental's claim, but American claimed that the insurance policy did not cover the additional losses incurred by Continental which included the damages to the display samples of the display trailer. Continental then sued American, among others, after American refused to pay Continental's claims for damages to the display samples and other items.

The trailer had been purchased by Continental in October of 1980, and was used as a means to display samples of Continental's products (electrical distribution devices) to its customers. The display trailer was a sales tool of Continental and was something new that had never been done before by Continental. Continental anticipated that the display trailer would be taken to the business locations of Continental's customers, which were located throughout the United States and Canada, at least twice over a six-year period.

The trailer was initially purchased for about $8,100 and before delivery of the trailer to Continental, pegboards had been inserted in the trailer costing Continental an additional $3,300.00. After arrival of the trailer at Continental, extensive renovations of the trailer were made, including the installation of various partitions and pegboards on the inside of the trailer, in order to customize the trailer for its specific use as a display trailer. Galvanized and polished samples of Continental's products were then attached to the pegboards. During renovations, Continental used at least 20 different suppliers of various items that went into the trailer. The renovations to the trailer, including the permanent attachment of the display samples, were completed by the Spring of 1981. The extent of such renovations, customization, attachments and the history and purpose of the trailer is set out in detail in Robert Allen's affidavit which is included herein in Appendix E and which was a part of the Record on Appeal in the Alabama Supreme Court. As shown in that affidavit, the display trailer had only one purpose and function and that was to display the samples of Continental products to its customers. It performed only that purpose

from the time of its creation in 1981, to the date of its destruction in 1983.

Prior to the purchase of the trailer, Continental had been using Creel to procure all the necessary insurance which Continental needed in its business. From 1980 until 1985, Creel handled the insurance matters for Continental, except life insurance. At the time Creel was handling Continental's insurance matters and at the time that the trailer was damaged in March of 1983, Creel was employed as an insurance salesman for Fowlkes and Smith. Creel left the employment of Fowlkes and Smith in May of 1983. During the time that Creel handled Continental's insurance matters, he placed Continental's insurance with American or with Commercial Union Insurance Company, which were the same companies.

Prior to Continental's purchase of the trailer, Gaddis Hall, president of Continental, discussed the details of the display trailer with Creel. When the trailer first arrived at Continental, Creel went to Continental and saw the trailer. At that time, Hall told Creel that it would take three or four months to renovate the trailer and told Creel the purpose of the trailer and how it would be used. Creel not only knew that the display samples would be in the trailer, but also knew which samples would be on display in the trailer and the value of those samples. Continental at that time wanted to get insurance coverage on the trailer and Creel told Continental that the trailer was covered by insurance.

After the renovations of the trailer were made and in the Spring of 1981, Creel saw the trailer in detail twice. Creel saw it once when it was 75% completed and again after the display trailer was entirely renovated. Hall showed Creel what was to be insured and told Creel that everything in the trailer, including the display samples, was to be insured. Creel told Hall that the display trailer, including the display samples, were covered by insurance. Creel told Hall this immediately before the trailer was put on the road in service. Based on Creel's statement that the trailer's renovations and display samples were insured, the trailer was thereafter put on the road. After the trailer was completely renovated, the cost of the renovations were called into Creel and sometime

after Creel saw the trailer in its completed state, the renovation cost figures of $22,000 were reported to Creel. Creel sought and located American which agreed to insure the display trailer under the insurance policy upon which Continental's claims against American are based, and Creel furnished to American all information concerning the display trailer.

On March 1, 1983, while Gaddis Hall was pulling the trailer, the trailer overturned and it and its equipment, including the display samples, were substantially damaged. See Robert Allen's affidavit in Appendix E as to the extent of such damages. After learning of the overturn, Creel told Allen that Continental was completely covered.

The pertinent provisions of the insurance policy issued by American, and upon which the Alabama Supreme Court based its opinion, are set out in the Alabama Supreme Court's opinion in Appendix A. Those provisions, with respect to American's indemnification agreement thereunder, include the following:

> "(1) We will pay for loss to a covered auto *or its equipment* under: . . .
> "****"
>
> "(c) Collision Coverage — caused by the covered auto's collision with another object or its overturn." (emphasis added)

A "covered auto" under the insurance policy includes a trailer.

Continental, by calling Creel, made a claim against American for damages to the trailer and the display samples. Creel thereafter sent a notice of Continental's claim to American. The claim made by Continental was for the value of the entire trailer of $22,000, which Continental contended could not be repaired. American made a payment to Continental of $9,329.00 to cover the claims for the value of the trailer and later made an additional payment to Continental. American paid for various damaged items to the inside of the trailer, including some of the trailer's renovations and the trailer's panels that held the display samples. The amount paid by American for the damages to the trailer was for several thousand dollars more than any amount as shown in the

policy, because it cost more to repair the trailer. American denied any liability under the policy for any damages to the display samples.

Continental thereafter filed this civil action against American and the other defendants.

ARGUMENTS SUPPORTING REASONS FOR GRANTING OF REQUESTED WRIT OF CERTIORARI

The compelling reasons for granting the requested Writ will follow the sequence of issues previously set forth in the "Questions Presented" section of this petition.

SUMMARY OF ARGUMENTS

The fundamental reasons for granting the Writ as requested herein are: (1) to provide the opportunity for directives to be issued by this Court establishing constitutional guidelines and mandates affecting and regulating a state appellate court's application of its standards of appellate review of summary judgments; (2) to establish the extent to which a state court's summary judgment has the constitutional consequence of violating the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution; and (3) to decide whether the guarantee of a trial by jury as provided in the Seventh Amendment of the U.S. Constitution is applicable to the States through the Fourteenth Amendment.

The first of the above reasons relating to this case, involves the Alabama Supreme Court deciding a federal question in a way that conflicts with applicable decisions of this Court, and is presented in Argument I, below. The second reason also involves the Alabama Supreme Court deciding a federal question in a way that conflicts with applicable decisions of this Court, and is presented in Arguments II and III, below. The third reason relating to this case involves an important questions of federal law which has not been, but should be, decided by this Court, and is presented in Argument IV, below.

Argument I asserts the proposition that the Alabama Supreme Court denied Continental "due process of law" by reason of that Court's failure to comply with established standards of appellate review governing a review by that Court of the issues raised by Continental on its appeal. Under such argument, Continental advances the following contentions: (A) that the established standards of appellate review were not followed by the Alabama Supreme Court, when that court failed to exercise the requisite independent or *de novo* form of review of the trial court's summary judgment; (B) that the Alabama Supreme Court violated it established standards of appellate review by concluding, as a matter of law, that the term "equipment" in the insurance contract (policy) was unambiguous; and (C) that the Alabama Supreme Court violated its established standards of appellate review when it found, as a matter of law, that the term "equipment" in the policy, when applied to the facts in this case, excluded the display samples from coverage under the policy.

Arguments II, III, and IV, in part, are founded upon the premise that the term "equipment" in the policy was ambiguous thereby creating an issue of fact to be determined at a trial or hearing conforming to the requirements of the Due Process Clause of the Fourteenth Amendment that requires: (1) a hearing under the provisions of the Alabama and Federal Constitutions; (2) a jury trial pursuant to the provisions of the Alabama Constitution; and (3) a jury trial pursuant to the provisions of the Seventh Amendment to the U.S. Constitution.

Continental also contends that the Alabama Supreme Court's affirmance of the summary judgment is due to be summarily reversed by this Court and that, as a matter of law, Continental, and not American, is entitled to a summary judgment on Continental's breach of contract claim.

The two causes of action in issue consist of Continental's claim of breach of the written terms of the policy (hereinafter referred to as "breach of contract claim") and of bad faith.

I. The Alabama Supreme Court Failed To Follow Established Standards Of Appellant Review Thereby Unconstitutionally Denying Continental "Due Process Of Law" Under The Fourteenth Amendment To The United States Constitution.

(A) The Alabama Supreme Court's decision in affirming the summary judgment entered by the trial court pursuant to Rule 56 of the Alabama Rules of Civil Procedure (ARCP) on Continental's breach of contract claim and on its bad faith claim is in direct conflict with a previous decision of this Court. That decision of this Court is found in *Boddie v. Connecticut,* 401 U.S. 371, 91 S.Ct. 780, 787, 28 L.Ed.2d 113, where this Court held that:

> " . . . a State must afford to all individuals a meaningful opportunity to be heard if it is to fulfill the promise of the Due Process Clause."
>
> . . .
>
> " . . . a rule may be held constitutionally invalid as applied when it operates to deprive an individual of a protected right although its general validity as a measure enacted in the legitimate exercise of state power is beyond question"
>
> . . .
>
> " . . . the right to a meaningful opportunity to be heard within the limits of practicality, must be protected against denial by particular laws that operate to jeopardize it for particular individuals."
>
> . . .
>
> "The State's obligations under the Fourteenth Amendment are not simply generalized ones; rather, the State owes to each individual that process which, in light of the values of a free society, can be characterized as due."

A more revealing explanation of this Court's meaning in *Boddie* of "process" that is constitutionally "due" under the Due Process Clause is found in the recent decision of the Alabama Supreme Court in *Duncan, Inc. v. Head, et al.,* case no. 86-1162 (rendered January 15, 1988). That court in the *Duncan, Inc.* decision made the following comments:

> "In spite of all the judicial decisions and scholarly treatises that attempt to define due process of law, the

> phase is really self-defining. A person is entitled to the benefit of and reliance on those rules and procedues the law has prescribed for cases of the kind in which he is involved."

The specifics of the process or "procedure that the law has prescribed" under the *Boddie* decision that is constitutionally "due" to Continental by the Alabama Supreme Court in its review of the summary judgment entered against Continental, is defined by the Alabama Supreme Court in its decision in *Cliniche v. Smith,* 374 So.2d 872, 873. That process or standard of review that is "due" under that decision requires the Alabama Supreme Court to independently examine the same factors that the trial court initially considered when the trial court entered the summary judgment on Continental's two causes of action. The standard of review that is "due" under the *Cliniche* decision, further requires that all reasonable inferences from the facts in the Appeal Record be viewed most favorable to Continental and that American must establish that Continental could not recover under any discernible circumstances on Continental's two causes of action. Pursuant to *Cliniche* directives, if there is even a scintilla of evidence presented to support Continental's two causes of action, the established standards of appellate review require that the summary judgment entered against Continental be reversed by the Alabama Supreme Court.

If the above standards or procedures that the law has prescribed for review of the summary judgments were not followed by the Alabama Supreme Court on Continental's appeal then, under the principles announced in the *Boddie* decision, Continental was unconstitutionally denied that process to which it was "due" under the Fourteenth Amendment of the U.S. Constitution.

Similar Standards of review govern the Federal appellate courts' review of summary judgments entered pursuant to Rule 56 of the Federal Rules of Civil Procedure (FRCP). *Morrison v. Washington County, Alabama,* 700 F.2d 678. The Eleventh Circuit Court of Appeals in the *Morrison* decision, at 700 F.2d 678, 682, confirmed that the standard of appellate review with respect to summary judgments do not involve " . . . a discretionary decision and should thus be indepen-

dently reviewed by the appellant court" and that "[c]onclusions of law rendered by means of summary judgment are subject to the same standards of appellant review as any question of law raised upon an appeal." Such construction of Rule 56 FRCP is equally applicable to Rule 56 ARCP, which is the procedural counterpart to that Alabama rule. See: *Parker v. King.* 402 So.2d 877, 879.

A more firm authoritative foundation to support the above constitutional principles was made by the Alabama Supreme Court in its decision in *Benton v. Alabama Board of Medical Examiners,* 467 So.2d 234. There, that Court applied the foregoing constitutional principle that a court of review must follow its established standards of review and that a failure to do so is an unconstitutional denial of due process of law under the Alabama Constitution. As previously shown, a denial of process that is "due" under the Alabama Constitution is likewise a denial of due process of law under the United States Constitution. See, *Boddie v. Connecticut,* supra.

Also see this Court's application of similar standards of appellate review of summary judgments, in this Court's decision affirming the denial of a summary judgment in *Sartor v. Arkansas National Gas Corporation,* 321 U.S. 617, 88 L.Ed. 967; *Gallick v. Baltimore and Ohio Railroad Co.,* 372 U.S. *Sartor v. Arkansas National Gas Corporation, 321 U.S. 617, 88 L.Ed. 967; Gallick v. Baltimore and Ohio Railroad Co.,* 372 U.S. 108, 9 L.Ed.2d 618, 83 S.Ct. 659; and *Poller v. Columbia Broadcasting Systems,* 368 U.S. 464, 7 L.Ed.2d 458, 82 S.Ct. 486.

By application of the foregoing constitutionally protected standards of appellate review to the facts in this case, it becomes convincingly clear that the Alabama Supreme Court failed to comply, in any respect, with such standards. As shown, the Alabama Supreme Court was constitutionally required to exercise its independent judgment in its review of the summary judgment. If, after exercising such an independent review, a scintilla of evidence exists to prove Continental's two causes of action, then the Alabama Supreme Court was required by the Due Process Clause of the Fourteenth Amendment to reverse the summary judgment entered by the trial court. Throughout its decision on the

issue of Continental's breach of contract claim, the Alabama Supreme Court deferred to the reasoning and judgment of the trial court and the only alleged independent act that the Alabama Supreme Court exercised in rendering its decision was its recitation of its four word conclusion on page 5 of its opinion (Appendix A) that "he [the trial judge] properly interpreted it [the term "ambiguous"].

The Alabama Supreme Court throughout its opinion acknowledged through the implication of its statements, that its review was not an independent or *de novo* review of the appeal record from which it derived its "four word" conclusion, but was a review parasiticly dependent upon the trial court's presumed findings and reasoning. The Alabama Supreme Court blindly incorporated the speculated reasoning and conclusions of the trial court, as evidenced by the following passage from that Court's opinion, on page 4 (Appendix A):

> "We cannot say that the trial judge erred in construing the definition of 'equipment' as excluding the display samples hauled in Continental's trailer. He [the trial judge] obviously determined that the meaning "equipment" did not include the display samples Continental had put in the trailer."

The Alabama Supreme Court went on further, in its "mindreading" standard of review, to conclude that:

> "The trial judge obviously determined there was no genuine issue of material fact on this point, concluding that, and as a matter of law, the term "a covered auto or its equipment" did not include samples or displays in the trailer."

The above excerpts from the Alabama Supreme Court's opinion clearly eliminates any possible characterization of that Court's review as being an "independent" or a *de novo* review. At most, as in *Benton v. Alabama Board of Medical Examiners*, 467 So.2d 234, the Alabama Supreme Court did nothing more than search the trial court's decision, in a speculative manner, under an "abuse of discretion" standard of review. The Alabama Supreme Court's decision in *Benton*, by itself, is abiding authority that the failure of the Alabama Supreme Court to follow in this case the established appellate

standards of review of summary judgments is a denial of due process of law.

The most obvious of all circumstances in the Alabama Supreme Court's opinion which provides the final ingredient from which to conclude that that Court did not exercise *any* independent review, is the complete absence from the Alabama Supreme Court's opinion of any narrated facts, circumstances or reasoning to support "its" conclusion that the summary judgment was properly granted on Continental's breach of contract claim.

Based upon the above, Continental was denied its rights to due process of law under the Fourteenth Amendment of the United States Constitution by the failure of the Alabama Supreme Court to follow established standards of appellate review and to provide Continental with process to which it was "due" under the Due Process Clause of that Amendment.

(B) If, under some theory, the Alabama Supreme Court is found to have exercised an alleged independent review, then that Court failed to follow established standards for reviewing issues involving a determination of whether, as a matter of law, a term in a contract is ambiguous. The Alabama Supreme Court acknowledged, in its opinion (Appendix A), by its citation of various Alabama appellate decisions, that it is the duty of the judiciary to initially determine, as a matter of law, if the term "equipment" is ambiguous. As confirmed by such decisions, if the term "equipment", after the exercise of such judicial duty, is determined to be ambiguous, then the extent of that term's meaning, as intended by the parties, must be determined by the trier of the facts.

The opinion of the Alabama Supreme Court resulted in the conclusion that the term "equipment" was not ambiguous, as a matter of law. That conclusion, when read in light of noteable extracts from that opinion, exhibits a most serious and flagrant example of logical contradiction.

The Alabama Supreme Court's expressed definitions of the term "equipment" contradicted its conclusion that that term was not ambiguous. That Court, on page 4 of its opinion (Appendix A), stated that the term "equipment" is "exceedingly elastic". An appropriate rhetorical question in

response to such a statement is "how can a term under any principle of semantics be "exceedingly elastic" and not be ambiguous." The Alabama Supreme Court not only concluded that the term "equipment" was "elastic", which would be sufficient in and of itself to show its ambiguity, but also that Court concluded that that term was "exceedingly" elastic. To so characterize the term "equipment" and thereafter to conclude that it is not ambiguous, results in a *per se* failure by the Alabama Supreme Court to follow the established standards of appellate review, as constitutionally required of that Court.

The Alabama Supreme Court, in its opinion, further evidenced the ambiguous nature of the term "equipment", as a matter of law, by that Court's comment that it "cannot say that the trial court erred in construing the definition of equipment to exclude display samples". That comment implies not only an obvious doubt as to the certainty of its conclusion that the term is unambiguous, but also implies an acknowledgement by that Court that other definitions and meanings exist.

The standard of review for determining whether a word is ambiguous as a matter of law, is set out in the Alabama Court of Appeals' decision in *Alonzo v. Sanford* 465 So.2d 1131, which cited as authority a previous decision of the Alabama Supreme Court. In *Alonzo,* at 465 So.2d 1131, 1133, the Court of Appeals held that if the language of an instrument is uncertain *in any respect* then it is ambiguous, as a matter of law. The Supreme Court of Alabama has acknowledged in its opinion that the term "equipment" is not only uncertain, but that it is "exceedingly" so.

A strikingly similar decision previously rendered by the Alabama Supreme Court refutes any potential argument that the Alabama Supreme Court followed the established standards of appellate review in concluding that the term "equipment" is not ambiguous. That Court in *Grimes v. Massey Ferguson, Inc.,* 355 So.2d 338, made a judicial determination that the term "equipment" was, as a matter of law, ambiguous and therefore held that the trial court's granting of a summary judgment was improper. Unlike the facts in this case, the Alabama Supreme Court in the *Grimes* case, had

far more available statutory, verbal context to aid that Court in making its initial inquiry of whether the term "equipment" was ambiguous. Yet, that very same Court that found that that term was ambiguous, now concludes that the term "equipment" is not ambiguous. The Alabama Supreme Court followed the appropriate standard of review in either the *Grimes* case or in this case; but not both. The internal inconsistency of the Alabama Supreme Court's opinion in this case and its near dogmatic conclusion resolves the dilemma.

The above clearly indicates that the Alabama Supreme Court failed to follow established standards of appellate review, as constitutionally required, in determining, as a matter of law, whether the term "equipment" was ambiguous, *vel non,* and thereby denied Continental its constitutional right of due process of law under the authority of the *Boddie* decision, supra.

Notwithstanding the above argument, if the Alabama Supreme Court had properly applied the established standard of appellate review in determining if the term "equipment" was ambiguous, Continental would have been entitled to a judgment, as a matter of law, on its breach of contract claim. The Alabama Supreme Court's conclusion that the term "equipment" is exceedingly elastic established as a matter of law that the term "equipment" is not only ambiguous, but also capable of having two reasonable interpretations. By application of the well-settled principles of law in Alabama the term "equipment" in the insurance policy is to be construed most strongly against American and that since the term "equipment" is ambiguous and is capable of two reasonable interpretations that interpretation favorable to Continental is to be adopted. *Mercantile Life Insurance Company v. Johnson,* 132 So.2d 248, 250; *Safeco Insurance Company of America v. Banks,* 152 So.2d 666, 670; *Nationwide Mutual Insurance Company v. Clay,* 469 So.2d 533, 542; *Consolidated Underwriters Insurance Company v. Landers,* 235 So.2d 818, 822. Continental is therefore clearly entitled to a judgment, as a matter of law, on its breach of contract claim.

As previously shown, the Alabama Supreme Court con-

firmed the ambiguous nature of the term "equipment" and that such term is capable of two reasonable interpretations; one of such interpretations being that the display samples were "equipment." Under the definitions of "equipment" as set out in the Alabama Supreme Court's opinion on page 4 (Appendix A) and by applying those definitions to the facts pertaining to the trailer and its display samples, as set out in Robert Allen's affidavit (Appendix E), Continental is entitled, as a matter of law, to a judgment that the display samples were "equipment" within the meaning of that term in the policy. Even American, by its own admissions as to the meaning of the term "equipment" in the policy, confirmed such conclusion. American's articulated definitions of the term "equipment" as shown hereinafter in quotes clearly result in the display samples falling within the definition of that policy term, since: the display samples "service the trailer" (Waldrep's deposition, pp. 53-54); since the display samples were "part of the trailer" (Waldrep deposition, p. 52/2); since the display samples were "normal and usual to the use of the trailer" (Waldrep deposition, p. 56/12); since the display samples were "necessary to operate the trailer" (Riddles deposition, p. 65/8); and since the display samples were used "for the function Continental desired" (Riddles deposition, p. 82/2). The display samples, as described by Robert Allen in his affidavit (Appendix E), clearly were included within the meaning of the term "equipment" as articulated by American, thereby entitling Continental to a judgment, as a matter of law, on its breach of contract claim under the established standards of appellate review.

(C) Assuming that the term "equipment", under some theory, is not ambiguous and Continental is not entitled to a judgment as a matter of law, the Alabama Supreme Court still unconstitutionally denied Continental due process of law by failing to apply established standards of appellate review. Under the foregoing standards, Continental was entitled to a jury trial on the issue of whether the display samples were "equipment", within the meaning of that term as defined by the Alabama Supreme Court in its opinion. The Alabama Supreme Court was required by the directives of the *Cliniche v. Smith* decision, supra, and by the Due Process Clause of the

Fourteenth Amendment to review the summary judgment under the established standard of review that if there is a scintilla of evidence that the display samples are "equipment", then the summary judgment must be reversed. A scintilla of evidence clearly existed, as a matter of law, from which to draw the inference that the display samples were "equipment" under the definitions as set out in the opinion of the Alabama Supreme Court and as those definitions are applied to the facts set out in the affidavit of Robert Allen (Appendix E) and to other facts in the Appeal Record. The source of the judgment determining whether the samples are "equipment" is a jury and not an appellate court which has made that judgment under what appears to be a standard of "I know it when I see it".

Authoritative support for the proposition that a factual issue existed for a jury's determination under the "scintilla of evidence" standard of review, can be found in the decisions of the Alabama Supreme Court involving similar propositions of law. In the following decisions, relying upon similar propositions, the Alabama Supreme Court found, as a matter of law, that the resolution of the following factual issues were for a jury determination: whether a residence was "new", *Waites v. Toran,* 411 So.2d 127; whether teeth are "sound", *Continental Assurance Company v. Kountz,* 461 So.2d 802; whether an aircraft is "instrumental equipped" *Hall Air of Gadsden, Inc. v. City of Gadsden,* 467 So.2d 230, 233. *A fortiori,* a factual issue exist as to whether the display samples are "equipment".

If the Alabama Supreme Court violated Continental's constitutional rights to due process, as argued above, then the Alabama Supreme Court's affirmance of the trial court's summary judgment on Continental's "bad faith" claim was likewise a denial of Continental's right to due process of law. The Alabama Supreme Court, in its opinion, expressed that since the term "equipment" did not include the display samples, a "debatable reason" existed for American to refuse to pay Continental's claims and, therefore, the summary judgment in favor of American on Continental's bad faith claim was proper. That decision was clearly premised upon the conclusion that the term "equipment" did not include

within its meaning the display samples and therefore Continental was not entitled to a directed verdict on its breach contract claim. As shown above, such premise was unsound.

Even if the term "equipment" is ambiguous, the affirmance of the summary judgment on Continental's bad faith claim was an unconstitutionally denial of due process of law. The Alabama Supreme Court has heretofore in *Continental Assurance Company vs. Koutz,* 461 So.2d 802; *Nationwide Mutual Insurance Company vs. Clay,* 469 So.2d 553; and *Aetna Life Insurance Company vs. Lavoie,* 470 So.2d 1060, after remand from the United States Supreme Court, in Case No. 82-426 and 82-1152, Supreme Court of Alabama, October term 1986-1987 (3/27/87) made it clear that the "directed verdict test" was not applicable where the facts show that an insurance company blatantly and intentionally failed to determine the existence of a valid reason for its denial of an insurance claim. The United States Supreme Court on the appeal of the *Lavoie* case, *supra* at 475 U.S. 813, 106 S.Ct. 180, 89 L.Ed.2d 823, 829, interpreted the previous opinion of the Alabama Supreme Court with respect to the directed verdict test by stating that the Alabama Supreme Court "interpreted" its prior opinions as not requiring dismissal of a bad-faith-refusal-to-pay claim even when a directed verdict against the insurer on the underlying claim was impossible. Also see, *Sparks vs. Republic National Life Insurance Company,* 647 P.2d 1127, as abiding authority supporting Continental's contention that American was not entitled to a summary judgment on Continental's bad faith claim, even if the term "equipment" is found to be ambiguous.

Contrary to the Alabama Supreme Court's conclusion, the facts found in the Appeal Record and as set out herein in Appendix G warrant a finding that a scintilla of evidence existed to support Continental's "bad faith" claim and a finding that Continental was denied due process of law by reason of the Alabama Supreme Court's failure to follow its standards of review. In any event, the bad faith claim must await a constitutionally appropriate determination of Continental's breach of contract claim.

It is clear from the arguments in Argument I (A) through (C) above, that the Alabama Supreme Court unconstitution-

ally failed to follow its established standards of review, thereby denying Continental that process to which it is "due" under the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution.

II. Continental Was Unconstitutionally Denied Due Process Of Law Under The Fourteenth Amendment Of The United States Constitution By The Alabama Supreme Court's Denial Of A Constitutionally Required Hearing On Continental's Two Causes Of Action.

The arguments to follow in Paragraphs II, III and IV are premised upon the constitutional soundness of Petitioners' arguments found in Paragraph I, above.

The Alabama Supreme Court, by unconstitutionally affirming the trial court's summary judgment on Continental's two causes of action, thereby denied Continental the opportunity: (1) for a constitutionally required hearing on Continental's appeal to that Court pursuant to the application of established standards of appellate review in conformance with U.S. Constitutional mandates; and (2) for *any* constitutionally required hearing on the factual issues presented by Continental's claims.

As previously shown by the *Boddie* decision, supra, the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution provides that the Alabama Supreme Court must provide Continental with a meaningful opportunity to be heard. By the Alabama Supreme Court's failure to follow the established standards of appellate review, Continental was denied that process to which it was "due" by that Alabama appellate court.

The fact that Continental was denied any hearing on the factual issues, whether meaningful or otherwise, by the Alabama Supreme Court's affirmance of the summary judgment was not only a violation of the Due Process Clause of the Fourteenth Amendment, but likewise, was a violation of the Due Process Clause under the Alabama Constitution. The Alabama Constitution guarantees such a hearing under

Article 1, Section 13, of the Constitution of Alabama of 1901. That section requires "That all courts shall be open; and that every person, and for any injury done him, . . . shall have a remedy by due process of law; . . . ". A fundamental requirement of Due Process in Alabama is the opportunity to be heard at a meaningful time and in a meaningful manner. *McMillon v. Hunter,* 439 So.2d 153.

The process that is "due" and required under the Alabama Constitution is also that process that is "due" and required under the Fourteenth Amendment of the U.S. Constitution. See, *Boddie v. Connecticut,* supra. See also the Alabama Supreme Court's decision in *Anonymous v. Anonymous,* 353 So.2d 15, 18, where that Court held that a denial of the opportunity to be heard is a denial of "Due Process of Law guaranteed by both the State and the Federal Constitutions."

Therefore, by reason of the Alabama Supreme Court affirmance of the summary judgments and its failure to abide by established standards of appellate review, Continental was denied due process of law under the Fourteenth Amendment to the United States Constitution.

III. Continental Was Unconstitutionally Denied Due Process Of Law Under The Fourteenth Amendment To The United States Constitution By Denial Of Its Right To A Trial By Jury Under The Alabama Constitution.

If the Alabama Supreme Court had complied with the established standards of appellate review as constitutionally required, Continental would have been entitled under the Due Process Clause of the Fourteenth Amendment to a trial by jury on the factual issues arising out of Continental's two causes of action.

The Alabama Constitution provides in Article 1, Section 11 "That a right to a trial by jury shall remain inviolate." Therefore, a trial by jury is the process "due" to Continental under the Due Process Clause of the U.S. Constitution, pursuant to the *Boddie* decision, supra, and pursuant to the Alabama Supreme Court's decision in *Finance, Investment and*

Rediscount Company v. Wells, 409 So.2d 1341, 1344. That Court's decision in the *Wells* case confirmed that that section of the Alabama Constitution preserved the right to a trial by jury in Alabama and cited reference to this Court's decision in *Ross v. Bernard,* 396 U.S. 531, 90 S.Ct. 733, 24 L.Ed.2d 729.

The decision rendered in *Lecates v. Justice of Peace Court No. 4, etc.,* 637 F.2d 898, by the Third Circuit Court of Appeals involved a fact situation whose only dissimilarity to this case is the name of the state that is involved. That Court, by following the constitutional principle announced in *Boddie v. Connecticut,* supra, held that since the State of Delaware had provided for a jury trial in its constitution, Delaware is therefore required to provide a jury trial under the Due Process Clause of the Fourteenth Amendment to the United States Constitution. A failure to provide a trial by jury as provided in the Delaware Constitution was held to be a violation of the Due Process Clause of the Fourteenth Amendment. Such reasoning equally applies to and is dispositive of this issue in Continental's favor.

This Court in *Poller v. Columbia Broadcasting System,* supra, at 368 U.S. 464, 7 L.Ed.2d 458, 461, 82 S.Ct. 486, described the constitutional restrictions on the granting of a summary judgment pursuant to Rule 56 FRCP, which, as previously shown, is a procedural sister of Rule 56 ARCP. There this Court said that "This Rule [56] authorizes summary judgment 'only where the moving party is entitled to judgment as a matter of law, when it is quite clear what the truth is, . . . [and where] no genuine issue remains for trial . . . [for] the purpose of this rule is not to cut litigants off from their right of trial by jury if they really have issues to try' ".

Based upon the above, the affirmance of the entry of the summary judgment was a violation of Continental's right to Due Process Law under the Fourteenth Amendment to the United States Constitution, as that amendment incorporates the right to a trial by jury as guaranteed under the Alabama Constitution.

IV. Continental Was Denied Due Process Of Law By Denial Of A Trial By Jury Under The Seventh Amendment Of The United States Constitution, As The Provisions Of The Seventh Amendment Are Incorporated Into The Due Process Clause Of The Fourteenth Amendment To The United States Constitution.

The Alabama Supreme Court's unconstitutional affirmance of the summary judgment on Continental's two causes of action has, as a resulting affect, decided an important question of Constitutional law which has not been, but should be decided by this Court. That question is whether the right to a trial by jury under the Seventh Amendment of the U.S. Constitution is applicable to the States through the Due Process Clause of the Fourteenth Amendment. Such question has been required to endure an existence without an answer, as the decisions of this Court have nearly completed the finished product of applying all of the individual rights under the first eight Amendments of the U.S. Constitution to the States through the Fourteenth Amendment.

The past judicial cost of this Court's piecemeal incorporation of such individual rights into the Due Process Clause of the Fourteenth Amendment and the continuing conflict within this Court as to the meaning (intended or otherwise) of the Fourteenth Amendment as is shown by the numerous dissenting opinions in decisions involving the issue of which of the rights in the first eight Amendments are to be included in the Fourteenth Amendment, requires that this Court meet this issue now and resolve it.

The Seventh Amendment provides that "in suits at common law, when the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved."

The issue of the application of the Seventh Amendment rights to the States has not been resolved, notwithstanding this Court's decisions in *Walker v. Sauvinet,* 92 U.S. 90, 23 L.Ed. 678, and *Walker Electric Manufacturing Co. v. Lyndon,* 262 U.S. 226, 67 L.Ed. 961, 43 S.Ct. 589. The time has arrived for a determination of whether the rights guaranteed by the Seventh Amendment are incorporated or absorbed

into the Due Process Clause of the Fourteenth Amendment due to the changing structure of our legal system since the rendition of those two decisions. This Court has reversed several of its former decisions and has thereby held that various rights guaranteed by the first eight Amendments are applicable to the States through the Due Process Clause of the Fourteenth Amendment. See, *Duncan v. Louisiana,* 391 U.S. 145, 20 L.Ed.2d 491, 495, 88 S.Ct. 144. In fact the Seventh Amendment is one of the few remaining provisions in the first eight Amendments which has not been held applicable to the States. *Colgrave v. Battin,* 413 U.S. 149, 37 L.Ed.2d 522, 536, 93 S.Ct. 2448 (note 4).

This Court has held that a trial by jury in a criminal case is "fundamental to the American scheme of justice", and therefore the Sixth Amendment guarantee to a trial by jury in a criminal case is applicable to the States through the Fourteenth Amendment. *Duncan v. Louisiana,* supra, at 20 L.Ed.2d 491, 496. That same reasoning which resulted in the *Duncan* decision is equally applicable to firmly support the legal conclusion that the Seventh Amendment right to a trial by jury is applicable to the States through the Fourteenth Amendment.

The historical setting in which the Seventh Amendment was adopted was not unlike the setting that surrounded the adoption of the Sixth Amendment. The Seventh Amendment's historical setting was highlighted by a controversy that was generated by fear that the civil jury itself would be abolished unless protected in expressed words, *Colgrave v. Battin,* supra, at 37 L.Ed.2d 522, 526, and that in criminal *and* civil cases, the purpose of a jury trial is to insure fair and equitable presentation of factual issues. *Colgrove v. Battin,* at 37 L.Ed.2d 522, 529. The privilege of being tried by a jury in civil suits was, at the time of the adoption of the Seventh Amendment, a "great and inestimable privilege". *William v. Florida,* 399 U.S. 78, 26 L.Ed.2d 446, 459, 90 S.Ct. 1893 (note 44).

Therefore, the premises that supported the conclusion that a jury trial in a criminal action is fundamental to the American scheme of justice, is equally applicable to a jury trial in a civil action. A civil jury trial was and is now

considered to be as fundamental to our system of justice as a criminal trial by jury, as shown by the numerous States that now protect the rights to a civil jury trial in their State constitutions.

Notwithstanding the above argument, the rights protected by the first eight Amendments were considered by the framers of the Fourteenth Amendment to be applicable, *in toto,* to the states through the Due Process Clause of the Fourteenth Amendment. See Justice Black's well-reasoned dissent in *Adamson v. California,* 322 U.S. 46, 91 L.Ed. 1093, 1917, some 30 years ago. In that dissent, Justice Black provided a detailed historical background to support the intent of the drafters of the Fourteenth Amendment that total incorporation by the Due Process Clause of all of the first eight Amendments was intended.

Today the realities produced by this Court's decisions have proved the soundness of Justice Black's dissent, with the exception of only few remaining personal guarantees under the first eight Amendments; one being the Seventh Amendment guarantees. Justice Black, in his concurring opinion in *Duncan v. Louisiana,* supra, 20 L.Ed.2d 491, at 504 and 509, acknowledged that since his dissent in *Adamson v. California,* this Court has held most of the specific Bill of Rights protections applicable to the States.

The words of Justice Black in that dissent have proved the wisdom that it took this Court thirty years to acquire by its piecemeal absorption or incorporation through the decisional process of the first eight Amendments into the Fourteenth Amendment. The wisdom of Justice Black's dissent provided the ideal garment that took this Court, during those thirty years, to weave by the numerous threads of each of its decisions. It is this Court's previous decisions incorporating most of the rights in the first eight Amendments that now compel the sound judicial generalization that the Fourteenth Amendment was intended and in fact does incorporate all of the individual rights expressed in the first eight Amendments.

The history of the Fourteenth Amendment, as set out by Justice Black in the *Adamson* and the *Duncan* cases, when considered with the previous decisions of this Court leaves

room for no other conclusion than that the Fourteenth Amendment requires that the Seventh Amendment right to a trial by jury applies to the states.

Based upon the above, the Alabama Supreme Court's unconstitutional affirmance of the summary judgment entered against Continental on its breach of contract and bad faith claims, resulted in the denial to Continental of its right to a trial by jury under the Due Process Clause of the Fourteenth Amendment, as that amendment incorporates the rights guaranteed by the Seventh Amendment.

CONCLUSION

For the reasons set forth above, it is respectfully requested that this petition for certiorari be granted and further, that this Court summarily reverse the decision of the Alabama Supreme Court which affirmed the summary judgment against Continental on its breach of contract claim and on Continental's bad faith claim.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 1st day of April, 1988, three copies of the above and foregoing Petition for Writ of Certiorari were served on counsel for all parties to the appeal in the Alabama Supreme Court, by placing same in the United States Mail, properly addressed and first class postage prepaid, addressed as follows:

Mr. Robert M. Girardeau
Attorney at Law
825 First Alabama Bank Building
Birmingham, AL 35203

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Attorney for Petitioners

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APPENDIX

Filed
Oct 2 1987
Clerk
Supreme Court of Alabama

APPENDIX A

THE STATE OF ALABAMA
JUDICIAL DEPARTMENT
THE SUPREME COURT OF ALABAMA
SPECIAL TERM, 1987

Continental Electric Company, et al.

86-369 v.

American Employers' Insurance Company

Appeal from Jefferson Circuit Court

MADDOX, JUSTICE.

This appeal involves an alleged failure by American Employers Insurance Company ("American"), to pay an insurance claim based on a policy of insurance issued to cover a trailer owned by Continental Electric Company ("Continental"). The specific question presented is whether American was obligated to pay a claim for display samples of Continental's products that were located in the trailer and were damaged when the trailer overturned. American paid a part of Continental's claim, but claimed that the contract of insurance did not cover the additional losses incurred by Continental. Continental then sued American, the insurance agency of Fowlkes and Smith, and John Creel, an employee of Fowlkes and Smith. The trial judge granted American's summary judgment motion on Continental's claims of: (1) breach of an insurance con-

tract with regard to the trailer; (2) breach of contract with regard to the samples located in the trailer; (3) bad faith refusal to pay; (4) a request for a declaratory judgment as to its rights under the language of the policy; (5) fraud; and (6) breach of an oral contract to insure, or negligent failure to insure the samples by the insurance company's agent. Claims (5) and (6) depend on a determination of whether Creel was an agent of American.

We reverse and remand as to claims (1), (5), and (6), but affirm as to all other claims.

I

Continental purchased a trailer in October of 1980, intending to use it to display samples of its products (electrical distribution devices) to its customers. Continental did extensive renovation of the trailer, including the installation of partitions and aluminum peg boards on the inside of the trailer, in order to customize the trailer for its specific use. Galvanized and polished samples of Continental's products were then attached to the peg boards.

The trailer overturned and there was damage to the trailer and the display samples.

II

One of the specific issues presented is whether American has properly paid the claims filed on the trailer involved in this case exclusive of the samples it carried.

American made a payment of $9,329 to cover the claims for the value of the trailer, exclusive of the samples, and later made additional payment. Continental claims the trailer was valued at $22,000 and the samples were worth only $5,000 to $7,000. Continental, therefore, claims the insurance payment should have been at least "around $15,000." (The $22,000 cost of the trailer itself minus the $5,000 to $7,000 value of samples.)

American argues that the trailer had been purchased for $8,100 thirty months prior to the accident, and that was, in fact, the price paid by Continental to replace the trailer that overturned. American further argues that it has paid a total of $10,179 in claims for the trailer. The language of the insurance policy expressly states that it is at American's option to "Pay for, repair or replace damaged or stolen property. . . ."

To decide this issue, the trial judge could properly consider any material that would have been admissible at trial, as well as material submitted in support of or in opposition to the summary judgment motion. *Purvis v. PPG Industries, Inc.*, 502 So. 2d 714, 715-16 (Ala. 1987). Whether an insurance policy is ambiguous is a question of law for the trial court. *Smiths Water Authority v. City of Phenix City*, 436 So. 2d 827, 830 (Ala. 1983). If the contract is deemed unambiguous by the trial court, the court must determine the nature and effect of its terms as a matter of law. *Brown Mechanical Contractors v. Centennial Insurance Co.*, 431 So. 2d 932, 942 (Ala. 1983).

In this case, the trial judge had before him the policy and the affidavits of the parties. He determined, as a matter of law, that American had complied with the policy terms regarding coverage on the trailer by paying the replacement cost of the trailer. We find, however, a scintilla of evidence that American failed to pay the amount due for the trailer. Consequently, a genuine issue of material fact existed; therefore, summary judgment was improper.

II

The next issue is whether the policy issued by American covers the samples on board the trailer when it overturned. The parties disagree over whether the policy, as written, covers the loss of the display samples. The pertinent language from the policy is:

> "(1) We will pay for loss to a covered auto *or its equipment* under: . . .
>
> "* * * *

> "(c) Collision Coverage — caused by the covered auto's collision with another object or its overturn." (Emphasis added.)

Put more simply, the issue is whether the displays inside the trailer were "equipment" within the meaning of the policy. The trial judge obviously determined there was no genuine issue of material fact on this point, concluding that, as a matter of law, the term "a covered auto or its equipment" did not include samples or displays in the trailer.

Black's Law Dictionary 630 (4th ed. 1951), defines equipment as "[f]urnishings, or outfit for the required purposes. An exceedingly elastic term, the meaning of which depends on context." In *Webster's New Collegiate Dictionary*, "equipment is defined, among others, as the set of articles or physical resources serving to equip a . . . thing: as (1): the implements used in an operation or activity." That same dictionary defines "equip" as meaning "to furnish for services or action. . . ." Both the appellants and the appellees have cited cases somewhat similar to this, but they have not cited, and our research has not revealed, a case directly on point.

We cannot say that the trial judge erred in construing the definition of equipment as excluding the display samples hauled in Continental's trailer. He obviously determined that the meaning of the word "equipment" did not include the display samples Continental had put in the trailer. The construction of a written agreement is a function of the court. *Jackson v. Hall*, 460 So. 2d 1290, 1292 (Ala. 1984), and "[W]here there is no ambiguity in [an insurance contract's] terms, this Court must enforce the contract as written and cannot defeat express provisions in the policy, including exclusions, by making a new contract for the parties." *Turner v. United States Fidelity & Guaranty Co.*, 440 So. 2d 1026, 1028 (Ala. 1983). This Court will not construe policies so as to provide coverage not intended by the parties. *Newman v. St. Paul Fire & Marine Ins. Co.*, 456 So. 2d 40 (Ala. 1984).

In reviewing the policy and the affidavits, the trial judge was required to give the policy language its common interpre-

tation and its rational and practical construction. *Green v. Merrill,* 293 Ala. 628, 631, 308 So. 2d 702, 704 (1975). The trial judge found the language of the contract to be unambiguous, he properly interpreted it, as a matter of law, to deny coverage under the particular facts of this case. The summary judgment on this issue is due to be affirmed.

III

Next, we turn to Continental's bad faith claim. It is necessary to prove five elements to sustain a claim of bad faith in Alabama:

(a) Existence of an insurance contract and a breach by the insurer;

(b) Intentional refusal to pay the insured's claim;

(c) Absence of any legitimate or arguable reason for refusal.

(d) The insurer's actual knowledge of the absence of an arguable reason; and

(e) If the intentional failure to determine the existence of a lawful basis is the theory relied upon, the insured must prove the insurer's intentional failure to determine whether there was a legitimate or arguable reason to refuse to pay the claim. *Mueller v. Hartford Insurance Co. of Alabama,* 475 So. 2d 554, 556 (Ala. 1985).

> "In the normal case in order for a plaintiff to make out a prima facie case of bad faith refusal to pay an insurance claim, the proof offered must show that the plaintiff is entitled to a directed verdict on the contract claim and thus, entitled to recover on the contract claim as a matter of law. Ordinarily, if the evidence produced by either side creates a fact issue with regard to the validity of the claim and, thus, the legitimacy of the denial thereof, the tort claim must fail and should not be submitted to the jury."

National Savings Life Ins. Co. v. Dutton, 419 So. 2d 1357, 1362 (Ala. 1982).

Here, the trial judge apparently found on the evidence before him that no fact issue was created on the element of

whether there was a "debatable reason" for the insurer's failure to pay and, therefore, that American was entitled to summary judgment on this claim. "The debatable reason . . . means an arguable reason, one that is open to dispute or question." *Mueller v. Hartford Insurance Co. of Alabama,* 475 So. 2d 554, 556 (Ala. 1985). The following facts before the trial judge supported his decision that a debatable reason for refusal to pay existed and that summary judgment in favor of American was proper; the trial judge's earlier decisions construing the unambiguous contract language; the statements of Creel in deposition testimony that he told Continental the samples were not covered; the replacement costs of the trailer in question; the payment already made by Continental; and the fact that Continental's complaint admitted it was in doubt and uncertain as to its rights under the policy.

"In short, plaintiff must go beyond a mere showing of nonpayment and prove a *bad faith* nonpayment, a nonpayment without any reasonable ground for dispute." *National Security Fire & Casualty Co. v. Bowen,* 417 So. 2d 179, 183 (Ala. 1982).

We hold the trial judge, based on the record before him properly concluded that a debatable reason for American's refusal to pay existed, and summary judgment on this claim was, therefore, proper.

IV

Next, Continental contends that it was entitled to the declaratory judgment sought in paragraph 25 of its complaint. The arguments presented in support of a declaratory judgment are no different from those presented in support of the contract claims discussed in parts I and II of this opinion. By granting summary judgment, the trial judge, in effect, issued a judgment declaring what he considered to be the proper construction of the policy — i.e. the construction urged by American. We affirm the trial court's refusal to declare rights separate from its rulings on the direct claims.

V

Next, Continental advances three arguments that hinge on a determination of whether an agency relationship existed between Creel and American. We will first resolve this question, and then look at each of the three arguments in turn.

The evidence before the trial judge when he granted summary judgment, viewed in the light most favorable to Continental, would tend to show: Fowlkes and Smith was an insurance company and John Creel worked as an agent for Fowlkes and Smith. Creel handled all of Continental's insurance; both Fowlkes and Smith and Creel could bind insurance coverage by American, and Creel was authorized to solicit and negotiate insurance contracts on American's behalf; Creel stated that if a loss had occurred on the day he bound insurance coverage on the trailer, American would have been liable for the loss.

The existence and scope of a principal-agent relationship is normally a question of fact to be determined by the jury. *Oliver v. Taylor*, 394 So. 2d 945 (Ala. 1981); *National Security Fire & Casualty Co. v. Bowen*, 447 So. 2d 133, 138 (Ala. 1983). We hold that these facts, therefore, viewed in the light most favorable to Continental, create a genuine issue of material fact as to whether Creel was an agent of American, and the trial court's grant of summary judgment was, therefore, improper on those aspects of the case hinging on whether Creel was an agent of American.

We emphasize that we do not hold Creel was an agent of American, and we do not hold that he had authority to bind American. We do hold that the evidence, viewed in the light most favorable to Continental, and under our scintilla rule, creates a genuine issue of material fact, on the following three issues, and these matters are to be resolved by a trier of fact.

VI

The first issue hinging on the agency relationship is whether an oral contract to insure the display samples was formed by Creel with Continental. Officers of Continental contend a con-

tract was formed; Creel states in his deposition, of course, that such a contract was not made. Such a conflict in the evidence made this issue improper for a grant of summary judgment. Resolution of this issue will be for a trier of fact after hearing the evidence and observing the witnesses.

It will be for a trier of fact to determine if Creel was American's agent.

VII

The next issue is much like the last one discussed. Continental alleges that Creel and American were guilty of a negligent failure to insure the samples in the trailer. An agent who is authorized to solicit and receive applications for insurance, and to countersign and issue policies of insurance entrusted to him by the company for that purpose must be regarded *quoad hoc* as the general agent of the company. *Hartford Accident & Indemnity Co. v. Oglesby,* 293 Ala. 620, 625, 308 So. 2d 695, 699 (1975). We are again careful to state that we do not decide that Creel was an agent of American, nor that he negligently failed to insure the display samples. We do hold that enough evidence was before the trial judge to provide the necessary scintilla of evidence and avoid a grant of summary judgment.

VIII

The third and final issue that hinges on the "agency" determination is the allegation of fraud. Continental contends that Creel, individually, and as an agent of American, defrauded it, and that both should be liable. Four elements are necessary to support a fraud claim of this type:

(1) There must be a false representation by the defendant to the plaintiff;

(2) The representation must concern a material fact;

(3) The plaintiff must justifiably rely on the representation; and

(4) The plaintiff must sustain damages as a result of its reliance.

Taylor v. Moorman Manufacturing Co., 475 So. 2d 1187, 1188 (Ala. 1985). Additionally, to support a claim for punitive damages, a plaintiff must prove that the misrepresentation was made willfully to deceive or that the misrepresentation was made recklessly without knowledge of its falseness. 475 So. 2d, at 1188.

The misrepresentations of an agent may be imputed to his principal, *Washington National Insurance Co. v. Strickland*, 491 So. 2d 872, 874 (Ala. 1985). The false representation made to Continental could consist of a misrepresentation of a material fact made willfully to deceive Continental; made recklessly without knowledge, and acted upon by Continental; or made mistakenly and innocently, and acted upon by Continental. *Smith v. Reynolds Metal Co.*, 497 So. 2d 93, 95 (Ala. 1986).

The record shows at least the scintilla of evidence needed to prove a cause of action for fraud against American, thereby precluding the entry of a summary judgment in American's favor. In other words, there is some evidence to show that Creel was an agent of American sufficient to hold American liable for Creel's alleged fraudulent statements.

This Court in *Burt v. Commercial Union Insurance Co.*, 489 So. 2d 547, 549 (Ala. 1986), held, under facts similar to the facts in this case, that a scintilla of evidence existed from which to conclude that the insurance company's agent committed a fraud for which the insurance company would be liable to the insured. Similar to the facts in the *Burt* case, there is substantial evidence that Creel was a subagent of Fowlkes, so that his misrepresentations would be imputed to American. Even if Creel acted in some representative capacity directly with American rather than as a subagent through Fowlkes, a scintilla of evidence exists to indicate that he acted as a general agent with such authority that Creel's misrepresentations became those of American.

The following facts from the record, if proven at trial and

believed by a trier of fact, would create a scintilla of evidence that Creel was an agent or subagent of American: at the time of the transactions with Continental, Creel was working at Fowlkes; Creel had been working at Fowlkes for 12 years; Fowlkes did a lot of business with American and Creel was a licensed agent with American through Fowlkes; Fowlkes could bind insurance coverage for American. Because Creel worked for Fowlkes, the authority under the agency contract between Fowlkes and American came into Creel's hands for execution. Creel could bind insurance coverage with American through Fowlkes. At all times referred to in Continental's complaint, Creel was an agent for American and was authorized to solicit and negotiate insurance contracts in American's behalf. The insurance policy involved in this litigation was initially issued from Fowlkes. Fowlkes would issue the actual policy from its offices. Fowlkes would have the policies at its office. Fowlkes would type whatever needed to be typed in the policies and do everything necessary to issue the policy. Once Fowlkes bound the insurance coverage, American was on the risk immediately.

There is evidence that Creel made a representation to Continental that the display samples were covered by insurance and that even after the trailer was damaged by the overturn, Creel made a similar statement that the samples were covered. Creel denied making such a representation. Viewing all these facts in the light most favorable to Continental, we hold that summary judgment on this claim was improper.

This Court, in *United States Fidelity & Guaranty Co. v. McKinnon*, 356 So. 2d 600 (Ala. 1978), held that the insurance company was estopped from denying that its subagent informed the insured that she had insurance coverage, and, therefore, the insured was covered by insurance.

American argues that summary judgment was also proper because there was no justifiable reliance on the part of Continental. Continental had been in possession of the policy for two and one-half years and had never examined it to see if it covered the display samples.

American relies upon *Torres v. State Farm Fire & Casualty Co.*, 438 So. 2d 757, 758-59 (Ala. 1983), where this Court held:

> "Because it is the policy of the courts not only to discourage fraud but also to discourage negligence and inattention to one's own interests, the right of reliance comes with a concomittant duty on the part of the plaintiffs to exercise some measure of precaution to safeguard their interests. In order to recover for misrepresentation the plaintiff's reliance must, therefore, have been reasonable under the circumstances."

That case is distinguishable on its facts.

In this case, we hold that the question of reliance is a fact question for the trier of fact. There is evidence that the policy premiums did not reflect the fact that the value of the trailer had been increased substantially, and that the policy should have reflected an increase. There was evidence that Continental's agents did not read the policy, even though Continental had it for over two years, to see if the display samples were covered. Under these facts, a trier of fact may find that Continental did not justifiably rely upon any representations of Creel. If so, that would eliminate an essential element of the cause of action, but, because we find that a fact question does exist, the trial judge erred in granting summary judgment as to the fraud count.

Based on the foregoing, we uphold the summary judgment as to all issues except three. These three issues, whether American committed a fraud on the insured, whether an oral contract was made so as to bind American and whether an agent of American committed an act of negligence in failure to insure the samples were not proper subjects for summary judgment. The cause is, therefore, affirmed in part, reversed in part, and remanded.

AFFIRMED, IN PART; REVERSED, IN PART; AND REMANDED.

Torbert, C. J., and Beatty, Houston, and Steagall, JJ., concur.

Adams, J., concurs in the result.

APPENDIX B

OFFICE OF
CLERK OF THE SUPREME COURT
STATE OF ALABAMA
MONTGOMERY

Re: 86-369

CONTINENTAL ELECTRIC CO., ET AL.,
Appellant

vs.

AMERICAN EMPLOYERS' INSURANCE CO.,
Appellee

You are hereby notified that the following indicated action was taken in the above cause by the Supreme Court today:

_____ Appeal docketed. Future correspondence should refer to the above number.

_____ Court Reporter granted additional time to file reporter's transcript to and including

_____ Clerk/Register granted additional time to file clerk's record/record on appeal to and including

_____ Appell____ granted 7 additional days to file briefs briefs to and including

_____ Appellant(s) granted 7 additional days to file reply briefs to and including

_____ Record on Appeal filed

_____ Appendix Filed

_____ Submitted on Briefs

_____ Petition for Writ of Certiorari denied. No Opinion.

XXXX Application for rehearing overruled. No opinion on rehearing. Maddox, J. – Torbert, CJ., Beatty, Adams, Houston & Steagill, JJ., concur.

_____ Permission to file amicus curiae briefs granted

/s/ ROBERT G. ESDALE

12/4/87
bsa

Robert G. Esdale, Clerk
Supreme Court of Alabama

APPENDIX C

THE STATE OF ALABAMA
JUDICIAL DEPARTMENT
IN THE SUPREME COURT OF ALABAMA
FEBRUARY 10, 1988

CERTIFICATE OF EXEMPLIFICATION

I, Robert G. Esdale, Clerk of the Supreme Court of Alabama, do hereby certify that a final judgment was entered on October 2, 1987, in the case of 86-369, *Continental Electric Company, et al., v. American Employers' Insurance Company*. An application for rehearing was filed on October 16, 1987, and overruled on December 4, 1987.

WITNESS my hand and seal of the Court attached at the Judicial Department Building, in the City of Montgomery, on this the 10th day of February, 1988.

/s/ ROBERT G. ESDALE

Robert G. Esdale, Clerk
Supreme Court of Alabama

I, C. C. Torbert, Jr., Chief Justice of the Supreme Court of Alabama, hereby certify that Robert G. Esdale, whose name is signed to the preceding Certification of Exemplification, is the Clerk of the Supreme Court of Alabama, duly appointed, and full faith and credit are due to his official acts. I further certify that the seal affixed to said exemplification is the seal of the said Court, and that the attestation is in due form of law.

In witness whereof, I have hereunto set my hand and affixed the seal of the said Court on this the 10th day of February, 1988.

/s/ C. C. TORBERT, JR.

C. C. Torbert, Jr., Chief Justice
Supreme Court of Alabama

APPENDIX D

SUPREME COURT OF THE UNITED STATES

No. A-629

CONTINENTAL ELECTRIC COMPANY, ET AL.,
Applicant,

v.

AMERICAN EMPLOYERS' INSURANCE COMPANY

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for the applicant,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including April 2, 1988.

/s/ JOHN PAUL STEVENS

Associate Judge of the Supreme Court of the United States

Dated this 18th day of February, 1988.

APPENDIX E

IN THE STATE OF ALABAMA)
JEFFERSON COUNTY)

AFFIDAVIT OF ROBERT ALLEN

My name is Robert J. Allen. I am the General Manager of Continental Electric Company (hereinafter referred to as "Continental"), and have been for the previous 10 years. I was responsible for the supervision of the renovation and construction of the Well Cargo trailer described below.

In 1981, Continental originated the idea of building a display trailer. The trailer was to be used for displaying to potential customers many samples of the products that Continental sells. Continental anticipated that the trailer would be on the road for six years, which was the expected physical life of the trailer. In that six year period, the trailer was to be driven or taken into every state in the United States and into all provinces of Canada at least twice.

During the year 1981, Continental purchased a Wells Cargo trailer which was enclosed and which meet Continental's specifications. After delivery of the trailer, Continental began the renovation and construction of the trailer pursuant to the previously drawn designs and plans for it to function as a display trailer. After the trailer's renovation was completed, it was then placed in service in travel. In 1983, the trailer overturned and the trailer and its equipment, including its display samples, were substantially damaged.

At the time of its overturn, the trailer was constructed in the following manner.

The inside of the trailer had petitions or panels to which the display samples were attached. Approximately 70% of the petitions or panels were made of metal pegboard, and 30% were made of plywood. The pegboard was made of high strength aluminum which had a strength greater than the actual hull of the trailer.

The metal pegboard and the plywood were anchored and attached vertically to 2" by 4" wooden upright studs; which studs were installed vertically in the trailer. The studs were attached to the top and bottom of the trailer at various points along the metal I-beams of the trailer. The trailer I-beams were the structural support to which the hull of the trailer was attached. The studs were attached to the I-beams in the roof of the trailer by bolts driven into and through the I-beams and then through the studs. A nut was then attached to each bolts after applying epoxy glue or cement to each bolt's threads. The nut was then tightened onto the bolts by a wrench with the application of additional torque. Some studs were attached to the wooden flooring of the trailer by the use of bolts and nuts in the same manner as described in this paragraph.

The metal pegboard panels were attached to the studs by drilling holes through the pegboard and then driving a bolt through the pegboard and then through the studs and attaching a nut to that bolt. Prior to screwing each nut onto the bolt, epoxy glue or cement was applied to the bolt threads. The application of epoxy to the threads of each bolt in the trailer was to provide additional assurance that none of the nuts would loosen and come off of the bolts. Each nut was then screwed onto the threads of the bolt and then tightened onto the bolt with the above described wrench and with such force that the threads of the bolt were, in several instances, destroyed. The wrench which was used to tighten each nut in the trailer had a long handle to provide additional torque or power to eighten each nut. This procedure for attaching the nuts to the bolts was used to make sure that the nuts attaching the pegboard to the studs and any other nut used in the trailer would not come loose under any circumstances.

After the trailer overturned, in order to remove the pegboard panels from the upright studs, it was necessary to cut many of the nuts off the ends of the bolts that held each sheet of pegboard to the studs. The nuts were cut off with a bolt cutter. It would have been nearly impossible to unscrew the nuts from the bolts because of the extent to which the nuts were tightened

onto the bolts and because some of the threads of the bolts were destroyed by the use of the excessive torque used to tighten the nuts to the bolts. Also the dried epoxy glue made it more difficult to unscrew the nuts.

The plywood panels were also attached to the upright wooden studs. They were attached by driving numerous sixteen penny nails through the plywood panels into the upright studs. These nails were driven in such a fashion that they could not be removed without damaging the sheets of plywood. The nails were placed through the plywood into the studs in such a fashion that the nails could not be individually removed by hand or by vibration caused by travel. After the overturn, Continental attempted to remove the plywood panels from the studs. In order to remove such panels, it was necessary to apply a leverage force between the studs and the plywood panels. In most cases the plywood panels were destroyed due to the force necessary to pry the nails loose.

After the pegboard and plywood panels were attached as above described, they were to be used as backing and support for the attachment of the sample products which Continental displayed approximately 100-125 products on the trailer and, during the course of the two years that the trailer was in actual use before its overturn, Continental added approximately twenty (20) additional products. No samples were ever removed or would have been removed from the trailer after they were attached because none of the samples were of the type to become obsolete.

The samples, that were attached to the panels and that were displayed, consisted of those made of iron, aluminum and fiberglass. One side of the trailer displayed only samples of fiberglass products, with the remainder of the trailer being used to display samples of the iron and aluminum products.

Before any sample could be attached to the pegboard panels, holes were drilled through the panels with the use of a heavy metal drill. The holes were drilled in accordance with previously drawn plans for the location of each display sample. A large drill with a handle on each side of it was used in order

to apply enough pressure and force to drill holes through the metal pegboard. Holes were also drilled through the plywood panels with the same drill and according to the same plans.

The display samples were attached to the pegboard and plywood panels with the intention that they would remain attached throughout the life of the trailer. Continental took the following action to insure that the samples were attached in such a manner. The samples which were attached to the pegboard and plywood panels were attached by three different methods. Those methods were as follows: (1) . 30% of the samples were attached by the use of U-bolts placed around a part of a sample product and then the threaded end of the bolts were driven through holes in the panels and then the nuts were attached to the bolts on the opposite side of the panels; (2) . 30% were attached by bolts placed through existing holes in the display samples and the threaded end of the bolts were then driven into and through the panels and nuts were attached to the bolts on the opposite side of the panels; (3) . 40% of the display samples had holes specially drilled through them so that the threaded end of the bolts were place through such holes and then through the holes in the panels. Nuts were then attached to the threaded end of the bolts on the opposite side of the panels. In each method of attachment described in (1) - (3) above, the bolts would pass through the samples and then through the pegboard or plywood panels and a nut would be attached to the bolts on the opposite side of the panels. The nut was screwed onto each bolt in exactly same manner as previously described for the attachment of the pegboard panels to the upright studs. The nut would be screwed on with excessive force produced by using the same wrench which has the capability of applying additional torque. Before tightening the nut onto each of the bolts the same epoxy glue or cement was placed on the bolts threads to insure that the nut would remain tight and would not come off. The force used to screw the nut onto each bolt would in some cases destroy the threads on the bolts. The force used to tighten the nut would be such that the nut in most cases could not be later removed, except by cutting

through the bolt itself with a bolt cutter. About 20% of all of the nuts were brased to their bolts. Brasing is the process of applying liquid metal (which later hardened) to the juncture of the nut and the bolt. Also about 50% of the ends of all of the bolts were cut off with a bolt cutter at a point just pass the tightened nut, thereby distorting the threats at the end of each bolt. Both the brasing and the cutting of the end of the bolts had the effect of adding additional insurance that the nut remained tight and stayed on the bolt.

The purpose of such a procedure for attaching the nut to each bolt was to insure that each sample would not come loose or disattached from the panels under any circumstance for the life of the trailer. The manner of attachment of the nut to each bolt was to insure that no sample, panel or wooden stud could come loose due to vibrations caused by movement in travel or by any other means while the trailer was on the road for the six year period. There were two display samples that laid on each side of the trailer that were not attached in the above manner.

Continental planned before the trailer went on the road that it would return, at most, twice a year to Continental's place of business. Therefore it was mandatory and essential that the samples and other renovations could never become loosen or become unattached from the panels or the trailer I-beams.

At no time, during the entire two years that the trailer was in operation before its overturn, did any display sample ever become unattached from a panel; nor did any pegboard, plywood, or upright studs ever become unattached. It was essential that all products be permanently secured to the trailer, because, if they came loose they could chip or indent in the case of the fiberglass samples, or abrade and possibly rust in the case of the metal samples. Also, any loose or unattached sample would interfere with the sales effect of the trailer and would result in the trailer being removed from service for the purpose of repairing and reattaching a display sample.

After the trailer overturned, most of the samples had to be

removed by a bolt cutter. Most of the pegboard panels that were not forced loose by the overturn were also removed in such a manner.

The dismantling of the trailer after the wreck was similar to the dismantling of a house. It would have been easier to remove the wheel of the trailer, than it would have been to remove: (1) any samples from the pegboard and plywood panels; (2) the plywood or pegboard panels from the upright studs; or (3) the upright studs from the I-beams of the trailer. Also, after the overturn it was easier to remove parts of the original hull of the trailer and the trailer doors from the trailer, than to remove Continental's display samples from the pegboard and plywood panels.

It is estimated that the trailer from the time that it went on the road to the time that it overturned, travelled approximately 80,000 miles.

Each product sample on the trailer was specially prepared for the purpose of influencing and persuading customers to purchase the products that each sample represented. Each sample was specially sanded, galvanized and attached to appeal to esthetic values and to motivate a customer to purchase.

At the time of the overturn, the samples and the pegboard panels were so permanently attached that very few of the samples came loose even with the tremendous force caused by the overturn. Only about three or four of the display samples came entirely loose from their setting and very few of the other samples broke partially loose.

American Employers' Insurance Company has previously paid Continental Electric Company for some of the damages caused by the overturn of the trailer. The amount paid included an amount for the: (1) damages caused to the upright studs and the labor for the cost of restoring them to their condition before the overturn; and (2) damages to some of the pegboard and plywood panels, including cost of labor to restore them to the condition they were in before the overturn. American Employers' Insurance Company has paid for at least a majority of the renovations made by Continental to the trailer,

but has refused to pay for the remainder of the damages to the renovations and for all of the damages to the display samples.

/s/ R. J. ALLEN, JR.

Robert J. Allen

SWORN AND SUBSCRIBED TO BEFORE ME THIS 23rd DAY OF JUNE, 1986.

/s/ KATHY A. CUNNINGHAM

Notary Public

APPENDIX F

III. STATEMENT OF THE FACTS

Continental incorporates herein its Statement of Facts set forth in its previous briefs filed in this appeal and all other references in said briefs to the Appeal Record.

IV. ARGUMENT

The standard for review by this Court of a trial court's summary judgement is the identical standard employed by the trial court in rendering its summary judgement. That standard is whether there was any genuine issue as to a material fact with respect to each of said two causes of action *and* whether American was entitled to a judgment as a matter of law. See: Rule 56(c) Alabama Rules of Civil Procedure (ARCP).

This Court review of the trial court's judgement is *de novo*. Such applicable standard of review does not permit any deference by this Court to the judgement of the trial court, since a summary judgement does not involve the resolution of facts, but only ascribes legal significance to such facts without a trial. Therefore, this Court occupies the same position as the trial court with respect to any determination of the merits of American's motion for summary judgement. If the resolution of a factual, as opposed to a legal, issue is necessary in ruling on American's motion for a summary judgement then that motion is due to be denied.

With respect to the issues raised in Continental's Application for Rehearing pertaining to its breach of contract claim, it appears that this Court in its decision of October 2, 1987, deferred to the trial court's resolution of the issues relating to that claim and did so, in a manner similar to this Court's traditional deference to an *ore tenus* decision rendered by a trial court.

This Court's decision also appeared to involve speculation as to the possible reasons warranting the trial court's summary judgement. Such reasoning, as described by this Court, did not appear in the record since the trial court's judgement consisted

of only an order granting American's summary judgement motion without any expressed reasons.

If the above conclusions have substance, then Continental respectively seeks this Court's exercise of its *de novo* or independent judgement with respect to the issue pertaining to Continental's breach of contract claim.

ARGUMENT A
(Breach of Written Contractual Term)

1) *The Contractual Term "Equipment" Unequivocally Includes the Display Samples*

Continental respectively request that this Court reconsider, in addition to the following argument, the arguments of Continental expressed in *Argument A(2)* in Continental's original and reply briefs, heretofore filed in this appeal.

Continental's argument in this section of this brief is directed to this Court's conclusions and reasoning as found in paragraph II, beginning at the bottom of *page 3*, of its decision rendered on October 2, 1987. It is not directed to any matters referred to in paragraph II, page 2, of said decision.

Every statement made by this Court in its decision on the issue of the ambiguity of the contractual term "equipment", with the exceptions of this Court's citations of legal propositions and this Court's approval of the trial court's decision, supports Continental's contention that the contractual term "equipment" unambiguously and unequivocally includes the display samples within its meaning, thereby entitling Continental to a judgement that American is contractually bound to indemnify Continental for damages to such samples.

APPENDIX G

FACTS ABSTRACTED FROM THE APPEAL RECORD BEFORE THE ALABAMA SUPREME COURT AND WHICH RELATE TO ESTABLISHMENT OF A "SCINTILLA OF EVIDENCE ON CONTINENTAL'S CLAIM OF "BAD FAITH AGAINST AMERICAN

The Appeal Record before the Alabama Supreme Court at the time of the rendition of its opinion consisted, among others, of the pleadings; responses to interrogatories; the affidavit of Robert Allen; which is also attached to this Petition (Appendix .....) ; and five depositions of various individuals.

The following symbols found at the end of a statement herein shall refer to page and paragraph numbers in the following described depositions or other documents in the Appeal Record: "R ....." means Appeal Record; "HD ...../....." means deposition; "RD ...../....." means Douglas Riddles' (American's agent) deposition; and "WD ...../....." means Robert Waldrep's (American's agent) deposition; "CD ...../....." means John Creel's deposition; "Appendix ....." means Robert Allen's affidavit, attached to this Petition.

The following statements pertain to matters in the Appeal Record that are probative of Continental's "bad faith" claim against American. All statements set out herein are substantially verbatim, except where changes or inferences were deemed necessary for purposes of clarity or to aid in the understanding of a statement within the context of its factual background. All statements contained in this appendix are also to be read in light of and in addition to other factual or inferential material contained in this Petition.

During the time that John Creel (hereinafter referred to as "Creel") handled the insurance for Continental, Continental's insurance was placed with American or with Commercial Union Insurance Company (CD 28/17) which were the same companies (CD 28/20). At all times referred to in the complaint, Creel was an agent for American and was authorized to

solicit and negotiate insurance contracts in American's behalf (CD 136/4, 136/8: R 7) American would pay Creel a percentage [of the premium on his sale of American's insurance to Continental (CD 128/19: WD 6/7).

After the display trailer was completed (HD 75/23), Hall showed Creel what was to be insured (HD 41/22, 75/17). Hall told Creel that he wanted everything in the trailer, including the display samples insured (HD 75/17, 84/17, 41/23). Creel said that the display trailer, including the display items, were covered (HD 75/17, 83/4). Creel said this immediately before the trailer was put on the road in service (HD 83/7). Continental would not have put the trailer on the road unless it was insured (HD 86/6). Based on Creel's statement that the trailer's renovations and display samples were insured, the trailer was thereafter put on the road (R 56, Hall's interrogatory response #6).

After the trailer was completely renovated, the cost of the renovations were called into Creel (HD 42/13, 43/6, 43/16, 44/20). Some time after Creel saw the trailer in its completed state, the renovation cost figures of $22,000 were called into Creel (HD 44/4, 47/23, 73/22).

On March 1, 1983 (the day that the display trailer overturned), an insurance policy was in existence and issued by American. That policy covered the trailer (RD 29/5, 29/21). It was Creel who sought and located American which agreed to insure the display trailer (CD 146/5, 132/6, 135/8, 135/16, 135/23). The insurance policy in this suit was initially issued from Fowlkes (R 74). Fowlkes was an agent of American at the time the insurance was issued by Creel which allowed Fowlkes to bind insurance coverage with American (CD 47/17). That contract allowed Creel to bind coverage and Creel's binding of the insurance coverage fell within the terms of that contract (CD 47/15). Once Fowlkes bound coverage, American was on the risk immediately (CD 48/2). If the trailer had been damaged on the day that Creel first bound the insurance coverage on the trailer, American would have been liable for the loss based on the policy (CD 47/8). Continental's

trailer was covered [by American insurance policy] because Creel told Continental it was covered for collision (CD 47/11).

The trailer overturned (on March 1, 1983) and was damaged along with its renovations and display samples. The trailer was valued at $22,000 (HD 129/5) and could not be repaired after its overturn (HD 60/20). Continental made a claim with American for the cost of the entire trailer (HD 127/20). The claim made against American for the damage to the trailer was made by Continental calling Creel (CD 125/8). Creel then sent the notice of the claim to American (CD 125/12). After the trailer was damaged, Creel talked to Bob Waldrep, the insurance adjustor at American (CD 58/5, 58/17, 68/19, 118/4, 119/2). Creel was probably doing most of the communication with American after the display trailer overturned (WD 104/7). The display samples were damaged when the trailer turned over (HD 135/23), and the samples were scarred, scratched, bruised, nicked, so that Continental would not want to use them as display samples (HD 136/20). The samples were damaged so they could not be reused (HD 55/16). Also, the trailer could not be repaired (HD 60/20, 61/12). The damages to the trailer and its equipment including the display samples are further described in detail in Robert Allen's affidavit. (Appendix .....)

American reviewed the claim submitted by Continental under the policy (WD 10/23). Continental's claim was in written form (WD 31/23). The claim pertained to damages to a trailer of Continental's (WD 14/21). The trailer had some type of display products on it (WD 18/17). In processing the claim for damages to the trailer, American referred to the Business Automobile Policy [which is the subject of this action] (WD Exhibit 2, 34/12). At the time the trailer was damaged, American agreed to pay for the trailer (CD 76/7). American did pay the claim of Continental for some damages to the trailer (WD 86/21). American initially paid the claim for the trailer damages according to an appraisal report (WD 50/23: WD Exhibit 3 to Waldrep deposition). The check which was paid to Continental was for items which were listed on the appraisal

report (WD Exhibit 3, 87/8). The carpeting and the fluorescent lighting in the trailer were paid for by American because they were listed on the appraisal report (WD 88/20). In processing the claim, American based the actual cash value of the trailer on the appraisal report (WD 100/21). American's liability under the policy is limited to the actual cash value of the trailer (WD 101/2). After the claim for the trailer damages was filed, American paid for some of the damages caused by the overturn, but had not paid for all of the damages to the renovations and has not paid for any of the damages to the display samples (Appendix ___). American paid for various damaged items inside the trailer, which included some of its renovations and the trailer panels that held the display samples. (WD 55/13)

On August 15, 1984, American, by a letter authored by Robert Waldrep, denied its liability, under the terms of the insurance contract, to pay Continental for damages to the trailer display samples (WD 45/14, 45/23). (See: Exhibit 4 to Waldrep's deposition; WD 27/19) In that letter, American made the following statement,

> "As we discussed, the trailer, as a vehicle, is the object insured under the subject policy and not those items which might be affixed to the trailer, but do not *service the trailer.* It is our opinion that although the insured's products were affixed to the pegboard which was attached to the trailer the mere affixing of those items to the pegboard does not make them become part of the trailer" (WD 53-54) (emphasis added).

At the time that American sent the letter of August 15, 1984, it had no other reasons in mind for denying the indemnity on Continental's claim for the damaged display samples (WD 68/19, 68/4). All grounds stated in American's letter of August 15, 1984, are all of American's grounds for the denial of the claim for indemnification of the display samples on the trailer (WD 69/17).

In processing the claim on the trailer, Waldrep did not refer to any other documents other than the policy and the policy

language (WD 22/18). He did refer to the previously referred to appraisal reports (WD 22/20). When he saw the photographs, he saw the items inside the trailer (WD 47/6). Waldrep was aware of changes in the trailer after it was purchased (WD 48/20) and knew there were some partitions affixed to trailer after it was purchased (WD 49/3). Waldrep received knowledge about the partitions from the appraisal report (WD 49/9). He never saw the trailer items other than in the photographs (WD 49/21). He was not familiar with the method of attachment of the pegboards (panels) to the inside of the trailer and with the inside of the trailer (WD 51/4). Waldrep stated there would be no reason for him to try to discover what the condition of the trailer was prior to its damage (WD 51/15), since it wouldn't have any bearing on the claim for damages to display samples (WD 51/12). American, in referring to content items in a trailer which it was determined were not covered means "those items which would be personal property of the insured, not a part of the trailer" (WD 52/2). American contended that the display samples were not normal and usual to the use of that trailer (WD 52/12). American assumed the use of the trailer was to haul items, whatever Continental desires to haul (WD 52/15). Waldrep doesn't recall specifically making any inquiries about the use of the trailer (WD 52/23). Waldrep assumed the trailer was to haul products of Continental's to various locations and he believes it was used as a display (WD 53/2). Waldrep would have drawn that assumption just from seeing the pictures (WD 53/4). Waldrep assumed that the display items were affixed to the pegboard (WD 54/19), and did not attempt to acquire such knowledge of how the display items were affixed to the pegboard (WD 55/7). American knew that in order for the trailer to be used for the function which Continental desired, it was necessary for it to have to pegboards (WD 58/2) and the pegboards were part of the trailer (WD 59/4). American understood the function of the trailer to be a display trailer (WD 53/6, 59/12). According to American, the means by which the display items were attached to the trailer would not have anything to do which whether

the display items were contents of the trailer or a part of the trailer (WD 61/7). The cost of an item may have something to do with whether it is covered by insurance (WD 106/1).

In denying Continental's claim, American did not consider the display items to be equipment of the trailer (WD 75/11), and determined that the display items were not equipment on the trailer (WD 76/9). American did not consider the display samples to be a part of the trailer (WD 75/17). Based on Waldrep's deposition (R 64-67), the claim of Continental for the damaged display samples should continue to be denied by American (WD 85/18). There is no definition at American Employers for the word "equipment" (WD 95/16). American's agent never looked up the definition of the word "equipment" (WD 96/5). Prior to denying the claim for damages to the display items, American's agent did not refer to any authoritative sources (WD 96/19). At no time did Waldrep refer to any manual in processing Continental's claim for display damages (WD 22/11).

As admitted by American designated agents, Waldrep and Riddles, American admitted that the display samples would be covered under the insurance policy if the display samples were "part of the trailer" (WD 52/2) or if the samples were "normal and usual to the use of the trailer" (WD 56/12), or if they were "necessary to operate the trailer" (RD 65/8) or if they "could be used for the function Continental desired" (RD 82/2).

No. 87-1644

Supreme Court, U.S.
FILED
APR 29 1988
JOSEPH F. SPANIOL, JR.
CLERK

In The
Supreme Court of the United States
October Term, 1987

—o—

Continental Electric Company, an Alabama corporation; and Randolph Hall, Gaddis Hall and Robert Allen, individually and as co-partners in the partnership doing business as R G & B Leasing,

Petitioners,

v.

American Employers' Insurance Company,

Respondent.

—o—

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

—o—

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QUESTION PRESENTED

1. Whether the United States Supreme Court has jurisdiction to entertain the Petition for Writ of Certiorari as no Federal Questions were presented to or passed upon by the Alabama Supreme Court.

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OPINION BELOW

Petitioners' statement of the Opinion Below is sufficient.

———o———

JURISDICTION

The United States Supreme Court is without jurisdiction under 28 U.S.C. 1257(3). The Federal Questions raised in the Petition for Writ of Certiorari were neither set forth for consideration to the Alabama Supreme Court nor ruled upon by that Court.

———o———

CONSTITUTIONAL, STATUTORY AND OTHER PROVISIONS INVOLVED

28 U.S.C. § 1257 (1964) provides in pertinent part:

> Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> . . .
>
> (3) By Writ of Certiorari . . . where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held by authority exercised under, the United States. 28 U.S.C. § 1257 (1964).

Supreme Court Rule 21.1(h) provides in pertinent part:

> If review of the judgment of a state court is sought, then the statement of the case shall also specify the

> stage in the proceedings, both in the court of first instance and in the appellate court, at which the federal questions sought to be reviewed were raised; the method or manner in raising them and the way in which they were passed upon by the court; such pertinent quotation or specific portions of the record, or a summary thereof, with specific reference to the places in the record where the matter appears . . . as will show that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari. Sup. Ct. R. 21.1(h) (1980).

Otherwise, Petitioners' statement of Constitutional, Statutory and Other Provisions Involved is sufficient.

———o———

STATEMENT OF THE CASE

Petitioners' statement is sufficient except insofar as Petitioners claim that the Federal Questions raised in the Petition for Writ of Certiorari were presented to the Alabama Supreme Court and ruled upon thereby. Petitioners' claims concerning the denial of due process of law as required by the Constitution of the United States were never raised. Furthermore, all references to trial by jury in the Alabama State court proceedings and Alabama Supreme Court opinion were made with regard to Alabama's summary judgment rule, Rule 56, Alabama Rules of Civil Procedure. At no time was this respondent or the Supreme Court of Alabama aware that Federal Questions were being raised by the Petitioners.

———o———

ARGUMENT

The Petition for Writ of Certiorari must be denied because no Federal Question was presented to or passed upon by the Alabama Supreme Court.

Continental Electric Company's Petition for Writ of Certiorari should be denied because the Court is without jurisdiction to entertain the questions set forth in the Petition. Petitioners have failed to raise a Federal Question in the Alabama State court proceedings. Furthermore, the Alabama Supreme Court has failed to pass upon a Federal Question in its decision in this case.

The Supreme Court's jurisdiction over final judgments rendered by state courts is set forth in 28 U.S.C. § 1257 as follows:

> Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> . . .
>
> (3) By Writ of Certiorari . . . where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held by authority exercised under, the United States. 28 U.S.C. § 1257 (1964).

This Court has considered on many occasions whether a Federal Question was "specially set up or claimed" and has stated that "[i]t is a long settled rule that the jurisdiction of this Court to re-examine the final judgment of a state court can arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system." *Webb v. Webb*, 451 U.S. 493 (1981). The Supreme

Court further requires in its rule of procedure 21.1(h) as follows:

> If review of the judgment of a state court is sought, then the statement of the case shall also specify the stage in the proceedings, both in the court of first instance and in the appellate court, at which the federal questions sought to be reviewed were raised; the method or manner in raising them and the way in which they were passed upon by the court; such pertinent quotation or specific portions of the record, or a summary thereof, with specific reference to the places in the record where the matter appears . . . as will show that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari. Sup. Ct. R. 21.1(h)(1980).

The record of proceedings in the Alabama state court does not "expressly or by clear implication" show that a federal claim was presented to the state court. Nor, have petitioners amply set forth in their Petition for Writ of Certiorari the presentation of such a federal question and ruling thereon by the Alabama Supreme Court.

Petitioners' asserted ground for Writ of Certiorari is the denial of due process of law as required by the Fourteenth Amendment of the United States Constitution. Petitioners further claim that such denial of due process arises from the Alabama Supreme Court's failure to follow established standards of appellate review, and also the Alabama Supreme Court's denial of a trial by jury as required by the Alabama and United States Constitutions. In Petitioners' statement of the case in their Petition for Writ of Certiorari, the only reference to due process claims being raised in the state court proceedings are as follows:

> "With respect to the issue raised herein pertaining to whether Continental was denied due process of law by the Alabama Supreme Court's failure to follow established standards of appellate review, Continental expressly presented that issue to the Alabama Supreme Court in its application for re-hearing with supporting brief. (See pages in Appendix F, infra.) That issue was ruled upon by the Alabama Supreme Court's general order overruling Continental's application for re-hearing."

Petition for Writ of Certiorari, pg. 6.

A review of Petitioners' Appendix F reveals no express presentation of the issue of denial of due process under the Fourteenth Amendment. In fact, Petitioners argue only the standard of review required by Alabama Rule of Civil Procedure 56(c), which provides that a summary "judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law". Ala.R.Civ.P. 56(c) (1987). The entire record of the state court proceeding, including Petitioners' briefs and the Alabama Supreme Court decision, is completely devoid of any mention or ruling upon the issue of denial of due process of law under the Fourteenth Amendment.

Even if Petitioners had raised expressly their due process claims in its application for re-hearing to the Alabama Supreme Court, constitutional issues raised for the first time in a petition for re-hearing; when such petition is denied without reasons given, come too late for review by the U.S. Supreme Court. *Citizen's National Bank v.*

Durr, 257 U.S. 99 (1921). Petitioners' application for rehearing was in fact denied without reasons therefor by the Alabama Supreme Court. See, Petition for Writ of Certiorari, Appendix B, p. A-12.

Petitioners have also claimed that the denial of trial by jury has given rise to denial of due process of law. The state court record is clear that all references to trial by jury were given with regard to Alabama's summary judgment rule and "scintilla rule." The "scintilla rule" provides the test as to whether there is a "genuine issue as to any material fact" which will prevent entry of summary judgment. *Wilson v. Birmingham Post Co.*, 482 So.2d 1209 (Ala. 1986). The Alabama Supreme Court understood the arguments to be framed around only Alabama rules as evidenced by the following excerpt from the Alabama Supreme Court decision wherein the court reversed summary judgment on whether an agency relationship existed between American Employers and Mr. John Creel:

> We do hold that the evidence, viewed in the light most favorable to Continental, and under *our* scintilla rule, creates a genuine issue of material fact, on the following three issues and these matters are to be resolved by a trier of fact. *Continental Electric Company v. American Employers Ins. Co.*, — So.2d — (1987) (Petition for Writ of Certiorari to the Alabama Supreme Court, Appendix A, p. A-7.) (emphasis added.)

Furthermore, in Petitioners' brief on appeal to the Supreme Court of Alabama, their statement of issues presented clearly shows that only Alabama law was set forth for review. *See*, Appendix A. Petitioners only set forth Alabama cases in support of their issues presented and raised no Federal Questions in connection therewith.

Petitioners also claim to have raised the issues of the denial of a jury trial as giving rise to denial of due process as required by the Constitution in their application for re-hearing. A review of Petitioners' issues presented and actual argument in their application for re-hearing reveal that no Federal Questions were raised or argued. See, Appendix "B" and "C".

Furthermore, even if Petitioners had raised the Federal Questions in their application for re-hearing, as noted earlier, this comes too late when the state court passes on the application for re-hearing only by denial thereof without an opinion. *Citizen's National Bank v. Durr,* 257 U.S. 99 (1921).

In *Illinois v. Gates,* 462 U.S. 213 (1983), the court identified reasons for the "not pressed or passed upon" rule. The court stated that: "[q]uestions not raised below are those on which the record is very likely to be inadequate since it certainly was not compiled with those questions in mind." *Id.,* 462 U.S. at 221, citing *Cardinale v. Louisiana,* 394 U.S. 437 (1969). In this case, the record is clearly inadequate as to any Federal Question because such was not in the mind of the parties when the record was compiled. Furthermore, "failure of the highest court of a state to pass on a Federal Question is assumed to be due to want of proper presentation in the state court unless the aggrieved party can show affirmatively to the contrary." *Webb v. Webb,* 451 U.S. 493 (1981). The court also set forth comity reasons which arise out of the "due regard for the appropriate relationship of the Supreme Court to the state courts", thus allowing a state court

"to rest its decision on an adequate and independent state ground". *Illinois v. Gates*, 462 U.S. at 222.

———o———

CONCLUSION

The only possible Federal Questions in the Alabama state court proceedings must be drawn by extreme inference. This Court has stated that "[a]t the minimum, however, there should be no doubt from the record that a claim under [a] federal statute or the *Federal Constitution* was presented in the state courts and that those courts were apprised of the nature or substance of the federal claim at the time and in the manner required by the state law." *Webb v. Webb*, 451 U.S. at 501. The Supreme Court should deny Continental Electric Company's Petition for Writ of Certiorari because Federal Questions were not raised, the Alabama Supreme Court was not apprised of the Federal Questions, and the Alabama Supreme Court did not pass upon such alleged Federal Questions.

Respectfully submitted,

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APPENDIX

APPENDIX "A"

STATEMENTS OF ISSUES PRESENTED

1. Did the trial court err when it rendered summary judgment on Continental's claim against American for breach of contract when the appeal record showed that a scintilla of evidence existed to prove such claim?

Wilson v. Liberty National Life Ins. Co.,
331 So.2d 617.

Hartford Accident and Indemnity Co.,
308 So.2d 695.

2. Did the trial court err when it rendered summary judgment on Continental's claim against American for fraud when the appeal record showed that a scintilla of evidence existed to prove such claim?

Continental Assurance Co. v. Kountz,
461 So.2d 502.

Burt v. Commercial Union Ins. Co.,
489 So.2d 547.

3. Did the trial court err when it rendered summary judgment on Continental's claim against American for declaratory judgment relief when the appeal record showed that a scintilla of evidence existed to prove such claim?

Antram v. Stuyvesant Life Ins. Co.,
287 So.2d 837.

4. Did the trial court err when it rendered summary judgment on Continental's claim against American for

bad faith when the appeal record showed that a scintilla of evidence existed to prove such claim?

Gulf Atlantic Life Ins. Co. v. Barnes,
405 So.2d 916.

Aetna Life Insurance Co. v. Lavoie,
470 So.2d 1060.

5. Did the trial court err when it rendered summary judgment on Continental's claim against American for negligence when the appeal record showed that a scintilla of evidence existed to prove such claim?

Alabama Farm Bureau Mutual Casualty Ins. Co. v. Haynes, 497 So.2d 82.

6. Did the trial court err when it rendered summary judgment on Continental's claim against American for breach of contract to insure when the appeal record showed that a scintilla of evidence existed to prove such claim?

Alabama Farm Bureau Mutual Casualty Ins. Co. v. Haynes, 497 So.2d 82.

APPENDIX "B"

STATEMENT OF ISSUES PRESENTED

3. Was the term "equipment" in the insurance contract ambiguous such that Continental is entitled to a jury trial on the issue of the meaning of that term?

Hill Air of Gadsden, Inc. v. City of Gadsden,
467 So.2d 230.

National Casualty Company v. Thompson,
96 So.2d 708.

4. Was Continental entitled to a jury trial on its cause of action for bad faith against American, if the term "equipment" is determined to be ambiguous?

Sparks v. Republic National Life Ins. Co.,
647 P.2d 1127.

Continental Ins. Co. v. Kountz.
461 So.2d 802.

APPENDIX "C"

IV. ARGUMENT

ARGUMENT "A"

3.) *The Term "Equipment" In The Insurance Agreement Was Ambiguous.*

There are numerous cases in which this Court has determined that contractual terms, far more ambiguous than the term "equipment", were ambiguous as a matter of law, thereby preventing the entry of a summary judgment. See: *Hill Air of Gadsden, Inc. v. City of Gadsden,* 467 So.2d 230, (meaning of lease provision concerning "instrument equipped" and "licensed by the FAA"); *Pierce-Dickerson Bonding Company v. Southern Guarantee Ins. Co.,* Oct. Term 1986-87, Case Number 85-723, 21 ABR 2063, 2/20/87 (meaning of " . . . use of the insured premise and all operations necessary or incident thereto"); *Flemming v. Alabama Farm Bureau Mutual Casualty Ins. Co.,* 310 So.2d 200; (meaning of "any member of the family of the insured residing in the same household as the insured"); *National Casualty Co. v. Thompson,* 96 So.2d 708 (meaning of "automobile"); *Lee v. Clark and Associates Real Estate, Inc.,* October term, 1986-87, Case Number 85-389, 21 ABR 2418 3/27/87 (construction of a release provision); See also the Arizona Supreme Court's decision in *Sparks v. Republic National Life Ins. Co.,* 647 P.2d 1127 (1982).

Also, if the term "equipment" was not ambiguous, why was it necessary for the trial court to review the affidavits, as stated by this Court in its decision at the top of page 5 of its decision. If the trial court must refer to matters extrinsic to the insurance agreement to determine the meaning of a contractual term, then the term is clearly

ambiguous and the case is due to be decided by a jury *and* not as a matter of law by summary judgment.

The insurance agreement also involves a term which, on its face, is not only ambiguous, but also, in application, that term became ambiguous by reason of a latent ambiguity. This Court, in *Mass Appraisal Services, Inc. v. Carmichael,* 404 So.2d 666,673, by quoting *Gibson v. Anderson,* 265 Ala. 553, 92 So.2d 692, stated:

> . . . It is said that latent ambiguity arises when the writing on its face appears clear and unambiguous, but there is some collateral matter which makes the meaning uncertain,' 32 C.J.S., Evidence, [section] 961b, p.915; 'that is, an uncertainty that does not appear on the face of the instrument, but which is shown to exist for the first time by matter outside the writing', 20 Am.Jur., Evidence, [section] 1157, p. 1010. And it is well established that partial or other extrinsic evidence is admissible to explain or clarify a latent ambiguity."

This Court in the *Carmichael* case, held that the terms of that contract involved a latent ambiguity and, for that reason, held that the trial court properly determined that the contract was ambiguous as a matter of law. Reasoning by analogy compels the same conclusion of ambiguity with respect to the term "equipment" in this case.

This Court in *Grimes v. Massey Ferguson, Inc.,* 355 So.2d 338, specifically found that the term "equipment" was ambiguous. Unlike this case, this Court, in the *Grimes* case, had far more available material to refer to in the statute as a whole, in order to determine the meaning of the term "equipment". It necessarily follows that the

term "equipment" in this case is far more ambiguous than the term "equipment" in the *Grimes* case. For that reason, American was not entitled to a summary judgment on Continental's the breach of contract claim, which is the subject of Continental's Application for Rehearing.

ARGUMENT C

(Bad Faith)

This Court, in its judgment, expressed that since the term "equipment" did not include the display samples, a "debatable reason" existed for American to refuse to pay Continental's claims and, therefore, the summary judgment in favor of American on Continental's bad faith claim was proper.

That decision was clearly premised upon the grounds that the term "equipment" did not include within its meaning the display samples and, based upon such premise, Continental was not entitled to a directed verdict on its contract claim. As shown above, such premise was unsound.

If this Court should hereinafter decide that the display samples are "equipment", then the summary judgment on Continental's bad faith clearly was improper and is due to be reversed.

Also, if this Court should agree with Continental's alternative argument that the term "equipment" is ambiguous, then the summary judgment rendered by trial court on Continental's bad faith claim is still due to be reversed. The Arizona Supreme Court in *Sparks v. Republic National Life Ins. Co., supra,* in considering a fact

situation similar to that in this case, said at 647 P.2d 1127, 1137:

> "We disagree with the defendants' contention that an insurer's belief that a portion of its insurance contract precludes coverage raises an absolute defense to a claim of bad faith. If the insurer's interpretation of its own contract as excluding coverage could render an insurer's claim 'fairly debatable' then insurers would be encouraged to write ambiguous insurance contracts, secure in the knowledge that an obscure portion of the policy would provide an absolute defense to a claim for bad faith. Although the insurer's belief that the validity of insured's claim was fairly debatable is a defense to a charge of bad faith, such a belief is a question of fact to be determined by the jury."

The *Sparks* decision is abiding authority supporting Continental's contention that American was not entitled to a summary judgment on Continental's bad faith claim, even if the term "equipment" is found to be ambiguous.

Further, this Court in *Continental Ins. Co. v. Kountz*, 461 So.2d 802; *Nationwide Mutual Ins. Co. v. Clay*, 469 So.2d 553; and *Aetna Life Ins. Co. v. Lavoie*, 470 So.2d 1060, after remand from the United States Supreme Court, at Case No. 82-426 and 82-1152, Supreme Court of Alabama, October term 1986-1987 (3/27/1987) made it clear that the directed verdict test was not applicable where the facts show that an insurance company blatantly and intentionally failed to determine the existence of valid reason for it's denial of an insurance claim. The United States Supreme Court on the appeal of the *Lavoie* case, *supra* at — U.S. —, 106 S.Ct. 1580, 89 L.Ed.2d 823, 829, interpreted the previous opinion of this Court with respect to

the directed verdict test by stating that the Alabama Supreme Court "interpreted" its prior opinions as not requiring dismissal of a bad-faith refused-to-pay claims even when a directed verdict against the insurer on the underlying claim was impossible.

The evidence indicates substantial evidence that American intentionally failed to determine if there was a valid reason for denal of Continental's claims for damages to the display samples. (See pgs. 42-44 of Continental's original brief on this appeal) American, therefore, was not entitled to a summary judgment on Continental's bad faith claim.